

## The Central Law Journal.

ST. LOUIS, DECEMBER 17, 1886.

### CURRENT EVENTS.

COMMERCE AMONG THE STATES.—The decision of the supreme court of the United States, in the case of *The Wabash etc. Co. v. Illinois*, which we published in our last number,<sup>1</sup> seems to render indispensable an early exercise by congress of the exclusive power conferred by the constitution of the United States to "regulate commerce \* \* \* among the several States." The decision, as we understand it, abrogates the supposed right of the States to regulate, within their respective jurisdictions, commerce among the States, until congress shall see fit to exercise the authority over the subject conferred upon it by the constitution. Upon this supposed right the Illinois statute was founded, and similar statutes exist in other States. All these statutes are shorn of their efficacy, except in matters of strictly local and domestic concern, and commerce among the States, or inter-state commerce as it is usually called, is wholly unregulated and carriers engaged in it may, throughout the United States discriminate for or against any shipper or the shippers of any city or region, either directly or by means of special rates, rebates, drawbacks or other devices. As we understand the decision, the power of the State to legislate on these subjects is limited to contracts for carriage, which begin and end within the State lines; if the contract includes a mile or a foot beyond the boundary; the State law becomes a dead letter for the whole route to be traversed. The enormous volume of transportation of goods and passengers, from one State into another, and across one or two or more States, imperatively requires some sort of regulation, some settlement of the questions which have grown out of the traffic, and some adjustment, upon, equitable principles, of the various interests of owners and passengers on the one hand, and carriers and corporations on the other.

<sup>1</sup> 23 Cent. L. J. 561.

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RECEIVERS.—A decision of some importance was made a few days ago by U. S. District Judge Gresham, in relation to the affairs of the Wabash Railroad Company, its receivers, its bondholders and its stockholders. The matter is entirely too intricate to be sketched, even in the most cursory manner in an article of this kind, and we only mentioned it because it is a new evidence of the necessity of legislation which will render the receivership system that has grown up in the federal courts less cumbersome and more equitable. The receiver in his normal state is a useful, very convenient and quite harmless part of the machinery of courts of equity. Under the practice of the circuit and district courts this officer has grown to such importance as to dwarf even the court itself. The duty of the receiver, under the original design upon which the office was created, was to take charge of the property committed to his care by the court, sell it as soon as he can, with due regard to the interests of all concerned, pay the proceeds to the parties entitled, report to the court and be denuded of his trust. The receiver in his present state, fully developed, is well described by Mr. Justice Miller in his dissenting opinion, in the case of *Barton v. Barbour*.<sup>2</sup> He says: "If these receivers had been appointed to sell the roads, collect the means of the companies and pay their debts, it might be well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He generally takes the property out of the hands of the owner, operates the road in his own way, with an occasional suggestion from the court which he recognizes as a sort of partner in the business; sometimes but rarely pays some money on the debts of the corporation, but quite as often adds to them, and injures prior creditors by creating a new and superior lien on the property pledged to them. During all this time he is in the use of the road and rolling stock, and performing the functions of a common carrier of goods and passengers. He makes contracts and incurs obligations, many of which he fails to perform."

The perversion of the office of receiver, which Mr. Justice Miller so well describes in the foregoing extract, is too firmly fixed in

<sup>2</sup> 104 U. S. 126.

the practice of the federal courts to be easily uprooted. It is based upon the reasonable idea that, in spite of all manner of financial storms, the cars must run, passengers must ride and freight be carried. Therefore, the receiver must operate the road. But it does not follow that he shall operate it forevermore, or that the foreclosure proceedings shall be indefinitely prolonged, in order that he may so operate it. We do not attempt to indicate in what manner congress can best remedy the abuses which the federal courts have permitted to grow up around the receivership system, but we think that the interests of the public and justice to stockholders and creditors imperatively demand that such a reform shall be effected as will remedy these evils, and to that end the powers of subordinate federal courts over matters of this character and many other like subjects shall be distinctly defined and rigidly circumscribed.

#### NOTES OF RECENT DECISIONS.

**MARRIAGE — DIVORCE — THE SEBRIGHT CASE.**—The reports of divorce trials are never dainty, by no means adapted to the use of schools, nor at all suitable for the domestic fireside. English divorce cases are particularly malodorous, and after the stale fumes of the Crawford-Dilke case and the fresh and pungent odor of the current Lord Colin Campbell scandal, it is comparatively like a breeze from Araby the blest, to get a whiff of a divorce suit of which the *gravamen* is not a breach of the seventh commandment.

Such a case is the Sebright-Scott case, of which, we are sorry to say, we have not seen a full report. The facts, however, seem to be that the lady in the case having considerable property, had also an unfortunate propensity to run into debt, and the alleged husband being a ready-money man contrived to become her creditor, and presumably made profits out of the transactions. Not content with paring off slips and bits from her fortune in this slow way, he resolved to take it all in at one fell swoop by marrying her, peaceably if he could, or forcibly if he must. Accordingly the lady was inveigled into a meeting with him at a public office where there was a

person authorized by law to solemnize the rites of matrimony and then there, as she alleged, in fear for her life and her liberty, and against her protest, they were married. The marriage was never consummated, and, within a reasonable time, we presume, she commenced proceedings to have the marriage declared a nullity. This was done by the court after a full hearing and much hesitation, and the London law journals are much exercised about the matter. The *Law Journal* of Nov. 20 fears that the ruling will "tend to confirm the popular fallacy that a marriage is no marriage if it has not been consummated." In another article the same journal says:

"Mr. Justice Butt says that 'the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. For example, an ordinary contract may be set aside on the ground of fraud, and Mr. Justice Butt is of opinion that a marriage may be set aside on that ground. But a contract obtained by fraud is voidable, not void. Therefore, a lady or a man who has married under pressure may elect to ratify or repudiate the contract. The result of this appears to be to introduce a new status into the law—namely, that of half-married. \* \* \* It is difficult to put the finger on the precise ground on which the present marriage was set aside. There was a little fraud, a little intimidation, and a little weakness of mind. There was not enough of each to make a case, but all taken together were considered enough. Yet twenty white rabbits will not make a black rabbit.'"

The *Solicitors' Journal* of the same date says:

"To the delight of the impressionable part of the public, and, we think, rather to the surprise of the majority of the legal profession, Mr. Justice Butt has seen his way to granting a decree of nullity in *Scott v. Sebright*, on the ground that the petitioner was, at the time of her marriage, incapable of consenting to the marriage contract. \* \* \* It may perhaps be questioned whether the case does not bear on the face of it something like the judicial sanction of the dissolution of a marriage by mutual consent, although, as Lord Penzance eloquently points out in *Mordaunt v. Mordaunt*,<sup>1</sup> the feature of non-recis-

<sup>1</sup> 2 P. D., at p. 196.

sion by consent is a feature which belongs to marriage contracts alone among contracts. As to the authorities, although no cases are cited in the judgment, it is well to point out that the books contain at least three cases,<sup>2</sup> in which a marriage has been declared void on the ground of incapacity to consent, not amounting to insanity. Of the three cases, *Wilkinson v. Wilkinson* is the strongest. There a rich infant, incurably imbecile, but whose friends had failed to procure her to be declared lunatic, had been inveigled into a marriage with a cousin "in concert with other parties." The ceremony was hurried, and the bride, when required to say 'I will' said 'No,' till prompted by the clerk and told to use the former words; moreover, when in the vestry, she 'took off the ring and threw it down, saying she was not married.' "

The London *Law Times* of the same date also comments upon the ruling thus: "The decision of Mr. Justice Butt in the Sebright nullity case seems, in some quarters, to be considered as a bold endeavor to do justice by straining the law, and as laying down principles inconsistent with the old strict views as to marriage. By the canon law from which our marriage laws are mainly derived,<sup>3</sup> not merely the 'consent' of the parties was essential, but 'sincerity' of consent was required. And it is clear that in English law a marriage by force is void:<sup>4</sup> The liberty of divorces in the Roman law rendered less necessary any very definite disposition regarding marriages contracted by force. The modern law, under which divorces became very difficult, made this omission a real defect. The canon law fills up that lacuna by making such marriages void. This may be shown by many authorities.<sup>5</sup> At the same time, it was held that voluntary cohabitation after marriage waived the right to have the marriage set aside, though it is clear that the mere fact of consummation did not. The idea that the amount of fear, needful to invalidate the marriage, should be sufficient 'to constrain a brave man' seems to be derived

from a constitution of Pope Honorius III., and will be found in the *Corpus Juris*, in Decret. Greg. lib. 4, tit. 1, c. 28 p. 545, and this Pope also considers early repudiation before consummation needful. The canonist Engel, p. 942, however, reasonably points out that a woman is more easily terrified, and that terror sufficient to daunt a brave woman will suffice. We are glad that Mr. Justice Butt has laid down a more liberal and rational doctrine, that the test of bravery has nothing to do with the matter. The question is rather the condition of mind of the contracting party."

We are fully persuaded that Mr. Justice Butt was in every point of view quite right. The test of every contract is consent, and sincerity is of the very essence of consent. Sincerity is always presumed when the party in question is competent to contract, and under no legal disability or duress. By the way, when judges and learned editors speak so confidently of marriage as a contract, what becomes of the *dictum* of the English judge, who, in *Morduant v. Moncriffe*,<sup>6</sup> so positively denied that marriage was a contract at all?<sup>7</sup>

<sup>6</sup> 43 L. J. Rep. H. of L. Prob. and Matr. 49.

<sup>7</sup> 23 Cent. L. J. 288.

## SUBSTITUTION OF MORTGAGES.

This question, along with the rights of intervening lien holders, is one that is scarcely mentioned by text-writers, though one that may be at times of vast importance. It would appear upon a casual observation that the establishment of liens should run from record date of instrument in force; but upon a careful consideration it will be seen that an equitable rule enters into the merits of this subject, and that the conclusion should be different from the one above suggested.

It may be stated, as a generally well established rule of law, that the taking of a new note and mortgage, to secure an indebtedness already existing by note and secured by mortgage, will not discharge the lien of the first mortgage.<sup>1</sup> In *Packard v. King-*

<sup>2</sup> *Harford v. Morris*, 2 Hagg. Con. 423; *Portsmouth v. Portsmouth*, 1 Hagg. 356; and *Wilkinson v. Wilkinson*, 4 Notes of Ecclesiastical Cases, 295.

<sup>3</sup> *Sherwood v. Kay*, 1 Moore P. C. C. 397; *Reg. v. Mills*, 10 Cl. & F. 534; 8 Jurist, 717.

<sup>4</sup> *Harford v. Morris*, 2 Hagg. Consist. 427, 436.

<sup>5</sup> *Greg. IX. Decretals*, iv., 2, 9; *Corp. Jur. Canonici* edit. 1730, p. 548. *Decret. iv.*, 1, 6; *ib.* 538.

<sup>1</sup> *Pouder v. Ritzinger*, 1 N. E. Rep. 44; s. c., 102 Ind. 571; *Packard v. Kingman*, 11 Iowa, 219; *Swift v. Kraemer* 13 Cal. 526; *Walters v. Walters*, 73 Ind. 425; *Burns v. Thayer*, 101 Mass. 426. At least not unless the

man,<sup>2</sup> Smith and Kingman executed a mortgage on personal property to one Horner. On December 22, 1858, Smith and Kingman moved into a hotel property, and by statute a landlord's lien attached upon the effects of Smith and Kingman. On December 24, the plaintiff took a new note and mortgage for the balance unpaid of the debt, and at the same time released the old mortgage. The appellate court, in passing upon the cause takes occasion to say, that "the taking of a new note and mortgage on personal property, to secure an indebtedness already evidenced by a note and mortgage on the same property, does not, even when the first note and mortgage are cancelled, operate to discharge the lien of such first mortgage." It is a proposition well established that the giving of one's note does not pay or extinguish the debt; so accepting the mortgagee's note for interest due on a mortgage does not pay that portion of the debt, nor discharge the lien of the mortgage to that extent.<sup>3</sup>

In an action to reform a mortgage, the facts were shown to be as follows: A executed a mortgage to B, but made a mistake in description of property. He, (A), made a second mortgage on same property to C, to secure a note given in payment of several long past due notes. Action by B to reform mortgage against C, who had no notice of mistake in first mortgage: *Held*, that action would lie, as second mortgage was given to secure a prior debt and no new consideration passed.<sup>4</sup> The right of restoration is allowed where the holder of a first mortgage, in ignorance of the existence of a subsequent recorded one, releases his mortgage and takes a new one; and under such circum-

stances the first mortgagee would be entitled to have the mortgage restored and given the original priority.<sup>5</sup>

The surrender of unpaid notes, secured by mortgage, and the taking of new notes and mortgage for the balance, does not of itself discharge the lien of the first mortgage.<sup>6</sup> But this would be otherwise if the indebtedness secured by the second mortgage was created by the parties getting together and having a settlement of mutual running accounts and other debts, among which was the first mortgage debt, and a balance is found due the plaintiff. This balance being put in a new note and mortgage would form a new consideration, and the lien of the first mortgage be divested.<sup>7</sup> But where there is an express agreement that the mortgage, under such circumstances, shall continue as a security, the lien of the first mortgage is not destroyed.<sup>8</sup>

In *Burns v. Thayer*,<sup>9</sup> it was held, that where a husband gave a mortgage for the purchase money of real estate, and this mortgage was afterwards discharged, and at the same time and as a part of the same transaction a new note and mortgage were given for the same purchase-money debt, the instantaneous seisin of the husband did not operate to give the wife a homestead in the premises.<sup>10</sup>

A mortgage secures a debt or obligation and not the evidence of it, and no change in its form will discharge the mortgage.<sup>11</sup> Whether a new mortgage, given in the place of an old one, shall be treated as a payment

creditor accept the mortgage with that understanding: See *Gregory v. Thomas*, 20 Wend. 17; *Hamilton v. Callender*, 1 Dall. 420; *Hutchinson v. Swartsweller*, 3 N. J. Eq. 205. And in that event the burden is upon the mortgagee to show that the mortgage lien was to be released upon the execution of the new instruments; *Sloan v. Rice*, 41 Iowa, 465.

<sup>2</sup> 11 Iowa, 219 (1860).

<sup>3</sup> *Hutchinson v. Swartswellers*, 31 N. J. Eq. 205; *Shipman v. Cook*, 1 C. E. Green, 251; *Rogers v. Traders' Insurance Co.*, 6 Paige, 595; *Dunham v. Dey*, 13 Johns. 40. The taking up of old notes and the giving of new ones for the same indebtedness, or the payment of part and new notes for the balance, the old mortgage remaining, will not destroy the lien of such mortgage: *Chase v. Abbott*, 20 Iowa, 154; *Tucker v. Alger*, 30 Mich. 67; *Huginin v. Starkweather*, 10 Ill. 492.

<sup>4</sup> *Busenbarke v. Ramey*, 53 Ind. 499; *Bowen v. Wood*, 35 Ind. 268.

<sup>5</sup> *Bruce v. Nelson*, 35 Iowa, 157; *Stimpson v. Pease*, 53 Iowa, 572; *Lambert v. Leland* 2 Sweeny, 218; *Shaver v. Williams*, 87 Ill. 469; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205.

<sup>6</sup> *Walters v. Walters*, 73 Ind. 425.

<sup>7</sup> *Walters v. Walters*, *supra*.

<sup>8</sup> *Port v. Robbins*, 35 Iowa, 208; *Goenen v. Schroeder* 18 Minn. 66; *De Cottes v. Jeffers*, 7 Fla. 284; *Elsworth v. Mitchell*, 31 Me. 247.

<sup>9</sup> 101 Mass. 426.

<sup>10</sup> *Gregory v. Thomas*, 20 Wend. 17; *Dillon v. Byrne*, 5 Cal. 455.

<sup>11</sup> *Swan v. Yaples*, 35 Iowa, 248; *Morse v. Clayton*, 13 S. & M. (Miss.) 375; *Seymore v. Darrow*, 31 Vt. 122; *Flower v. Elwood*, 66 Ill. 438; *Moses v. Trice*, 21 Gratt. 556; *Nightingale v. Chaffee*, 11 R. I. 609; *Brown v. Dunckel*, 46 Mich. 20; *Swain v. Frazier*, 35 N. J. Eq. 326; *Vick v. Smith*, 83 N. C. 80; *Smith v. Stanley*, 37 Me. 11; *Oilphant v. Eckerley*, 36 Ark. 69; *Helmetog v. Frank*, 61 Ala. 67; *Bodkin v. Ment*, 86 Ind. 560; *Williams v. Starr*, 5 Wis. 534; *Franklin v. Cannon*, 1 Root (Conn.), 500; *Elliot v. Sleeper*, 2 N. H. 525; *Christian v. Newberry*, 61 Mo. 446.

of the one for which it was substituted, will depend upon the purpose and understanding of the parties to the transaction. But not only will the intention of the parties be determined by the express agreements, but, in the absence of such, by the circumstances attending the transaction, from which such intention may be inferred.<sup>12</sup> The court, in *Swift v. Kraemer*,<sup>13</sup> say: "We regard the cancellation of the old mortgage and the substitution of the new as cotemporance acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity looking to the substance of such a transaction would not permit a release intended to be effectual only by force of, and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage were inoperative."<sup>14</sup>

A mortgagee who takes a new mortgage from the grantee of his mortgageor in the place of the old one, does not lose his priority over judgment liens existing subsequent to the date of the old mortgage.<sup>15</sup> If a mortgagee release his mortgage and accept a new mortgage, without knowing of the existence of a second mortgage, the second mortgagee will not be allowed to avail himself of the advantage thus gained;<sup>16</sup> and the law will uphold a mortgage lien in favor of a mortgage against an intervening title, even where the parties had undertaken to discharge the mortgage, unless injustice would be done thereby.<sup>17</sup> And thus a mortgagee lien, purchased by the owner of the equity of redemption, will, in the absence of a contrary intention manifest to the court, be kept alive in equity for the purchaser's protection against an intervening incumbrance.<sup>18</sup>

In *Rump v. Gerkins*,<sup>19</sup> the plaintiff released his mortgage, not knowing of a junior

mortgagee, and the court say, that such did not extinguish the lien of the first mortgage, so that he (the plaintiff) could not use it as a protection to his right against the subsequent mortgage. "In other words, a court of equity will regard it as still existing as a lien and not having merged, so as to protect him against the subsequent mortgage. \* \* \*

In law a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and in the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would exist at law, and sometimes preserve it where at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united."<sup>20</sup>

A mortgageor, for his own advantage, yet in good faith, procures satisfaction pieces from his mortgagee and cancels the mortgages without paying the mortgage money, and does so upon an understanding to give new mortgage, but dies without accomplishing it, and his heirs after him give such new mortgage: *held*, that the new mortgage executed by the heirs should have the same effect as the old securities.<sup>21</sup>

*Contrary Doctrine.*—A rule contrary to the one above maintained is steadily followed by the court of Maryland, and, as far as we are able to discover, that State is alone in its position. It is there said that the release of of one mortgage and the giving of another on the same property, for the same debt to the same mortgage, does not avoid the loss of the first mortgage lien by the release,<sup>22</sup> and although the only consideration for the release is the simultaneous execution of another mortgage to the same tenor and effect as the released mortgage.<sup>23</sup>

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<sup>12</sup> *McDonald v. Halse*, 16 Mo. 503; *Berrell v. Schie*, 9 Cal. 104; *Flower v. Elwood*, 66 Ill. 438; *Grimes v. Kimball*, 3 Allen (Mass.), 518.

<sup>13</sup> 13 Cal. 526.

<sup>14</sup> *Randall v. White*, 84 Ind. 509.

<sup>15</sup> *Fisher v. Spahn*, 4 Can. L. T. 446; s. c., 19 Cent. L. J. 256; *Gregory v. Thomas*, 20 Wend. 17.

<sup>16</sup> *Farmers' Insurance Co. v. German Insurance Co.*, 14 C. L. J. 57; s. c., 79 Ky. 598; *Rump v. Gerkin*, 59 Cal. 496; *Tucker v. Alger*, 30 Mich. 67.

<sup>17</sup> *Boone on Mort.*, sec. 142; *Stantons v. Thompson*, 49 N. H. 272; *Webb v. Meloy*, 32 Wis. 319; *Woodward v. Davis*, 53 Iowa, 694.

<sup>18</sup> *Duffy v. McGuinness*, 13 R. I. 595; s. c., 15 Rep. (N. S.) 250.

<sup>19</sup> 59 Cal. 496.

<sup>20</sup> See also *Forbes v. Moffatt*, 18 Ves. 384; *Carpenter v. Brenham*, 40 Cal. 235.

<sup>21</sup> *United States v. Crookhank*, 1 Ed's. Ch. (N. Y.) 233.

<sup>22</sup> *Woolen v. Hillen*, 9 Gill. 185; s. c., 52 Am. Dec. 690.

<sup>23</sup> *Alderson v. Day*, 6 Md. 57; *Neldig v. Whitford* 29 Md. 183; *Hill v. West*, 31 Am. Dec. 442. And for further citation of cases on this, see note to *Woolen v. Hillen*, 52 Am. Dec. 690.

# DISTRIBUTION OF ASSETS ON MISTAKEN CONSTRUCTION OF WILL.

In a recent text-book, Mr. Walker's very able and instructive "Compendium of the Law Relating to Executors and Administrators," we find it laid down that, "where an executor or administrator, without any judicial decision, authority, or investigation, pays over the estate to those whom he supposes to be, but who in fact are not, entitled thereto, he must replace it with interest at four per cent. ;<sup>1</sup> but, where an executor, under a *bona fide* belief that they were entitled thereto, himself retained a third of the residue, and paid two-thirds to his co-executors, on being ordered to refund it, he was only held liable to pay interest on the third retained by himself." *Saltmarsh v. Barrett*,<sup>2</sup> is the authority cited for the latter position, and true it is that Sir John Romilly there held that an executor who paid money under a mistake was not liable, though liable to refund the principal, to pay interest on it. But is that sound law? "Generally speaking," as Lord Cranworth said, in *Attorney-General v. Alford*,<sup>3</sup> "every executor and trustee who holds money in his hands is bound to have that money forthcoming; he is, therefore, chargeable with interest, and is almost always to be charged with interest at four per cent. It is presumed that he must have made interest, and four per cent. is that rate of interest which this court has usually treated it as right to charge." And dealing with the case, not of willful default, but merely of an executor or trustee who has received the trust fund, in respect of which the demand for interest is made, he observed: "What the court ought to do, I think, is to charge him only with the interest which he has received, or which he is justly entitled to say he ought to have received, or which it is fairly to be presumed that he did receive, and that he is estopped from saying that he did not receive it. I do not think there is any other intelligible ground for charging an executor with more interest than he has made than one of those I have mentioned." On the other hand, in the case of willful default, in which an executor, of course, would be more hardly dealt with by the court, the rea-

son he assigned was "because it might fairly infer that he used the money in speculation, by which he either did make five per cent., or ought to be estopped from saying that he did not. The court would not inquire what had been the actual proceeds, but in application of the principle *in odium spoliatoris omnia presumuntur*, would assume that he did make the higher rate—that is, if that were a reasonable presumption." And see *Jones v. Searle*.<sup>4</sup> Thus, it is not on a mere punitive principle that the court proceeds; and as Lord Hatherley said, in *Burdick v. Garrard*,<sup>5</sup> "the principle laid down in the case of *Attorney-General v. Alfred* appears to be the sound principle, namely, that the court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money, by directing rests, or payment of compound interest, but proceeds upon this principle, that either he has made, or has put himself into such a position that he is presumed to have made five per cent., or compound interest, as the case may be." And so observed Lord Justice James, in *Vyse v. Foster*:<sup>6</sup> "This court is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing anyone. In fact, it is not by way of punishment that the court ever charges a trustee with more than he actually received or ought to have received, and the appropriate interest thereon."<sup>7</sup>

The latter sentence was quoted with acquiescence by Mr. Justice Chitty in *Re Hulkes*, *Powell v. Hulkes*, reported in last Saturday's *Law Times*; and we find the learned Judge referring, also, to another case, *Att.-Gen. v. Kohler*,<sup>8</sup> where the question was whether an administrator who had wrongly paid over the estate under the intestacy was liable, when he had to account to the next of kin for the principal of the estate, to pay interest. Lord Cranworth, after showing that the administrator had paid away the money in error, and under a mistake of fact, stated his opinion that the administra-

<sup>1</sup> *Turner v. Maule*, 3 De G. & Sm. 497.

<sup>2</sup> 31 Beav. 349.

<sup>3</sup> 4 D. M. & G. 851.

<sup>4</sup> 49 L. T. N. S. 91.

<sup>5</sup> L. R. 5 Ch. 333.

<sup>6</sup> L. R. 8 Ch. 309, aff. L. R. 7 H. L. 318.

<sup>7</sup> Cf. Ex. p. *Ogle*, L. R. 8 Ch. 717.

<sup>8</sup> 9 H. L. Cas. 645.

tor was liable to pay interest as a matter of course: "I can discover no ground," he said, "for relieving him from the payment of interest more than from payment of principal. His liability would have arisen from his having improperly paid over to the crown money belonging to the next of kin." The administrator there had been the nominee of the crown, but this was altogether immaterial on the point, and we may add that it had been held before, in *Turner v. Maule*,<sup>9</sup> that if the solicitor to the treasury, having taken out administration, pays the fund into the treasury, no next of kin appearing, he must, on their appearance, replace the fund with interest at four per cent. Proceeding, then, in reference to the case of payment made by an administrator in a mistaken view of the law or facts, apart from my sinister intent, Lord Cranworth added: "Principle and authority both require that in such a case he should be dealt with as if he had improperly retained the money in his own hands, and his liability to pay interest as well as principal is clear." "The other members of the House of Lords who advise the House in their speeches," continued Mr. Justice Chitty in *Powell v. Hulkes*, "came to the same conclusion, and the judgment of the House of Lords went not simply for the principal, but for the interest. The circumstance that Lord Campbell, who had died before the judgment was given, had formed an adverse opinion is a circumstance, of course, that can have no weight with me. What I have stated is the judgment of the House of Lords, and it is put simply on the ground by Lord Cranworth that the administrator who has improperly paid money away is deemed by a court of equity still to have the money in his own hands. The judgment of Lord Hatherley, in *Middleton v. Chichester*,<sup>10</sup> strongly illustrates what I have been saying. The case was one under the Debtors' Act, 1869. The trustee, who had been ordered to pay by a court of equity any sums in his possession or under his control, was liable to be attached for default of payment, and the question was as to the meaning of the words 'any sums in his possession or under his control.' In expounding the statute Lord Hatherley stated a general proposition of equity upon which he founded

himself, in order to arrive at the true meaning of the words 'in his possession or under his control,' as used in the statutes, and he said: 'But there is a sensible and intelligible construction to be put upon the clause, if you read it as pointing to a person who, in respect of his having held trust funds for which he is accountable, is treated by a court of equity as having them in his possession until he has properly discharged himself.' A payment to a wrong person obviously is no discharge. I think that there Lord Hatherley was correctly stating the view which the court of equity, at least in modern times, has always taken. In order to avoid misapprehension, I would say, that in this case there is no question of willful default. A trustee is liable to be charged with interest on balances in his hands, and I am sorry to say it often happens that trustees are so charged on the further consideration of administration actions. The court never inquires whether the trustee has spent them or what he has done with them, but finds in taking the account that there was a balance remaining in his hands. Where he has received the fund and retained it he is held liable for interest at four per cent., being at the same time at liberty to excuse or justify himself where he shows the exigencies of the trust required that he should retain the money in question in his hands for the purpose of the administration of the estate. What I have stated I consider to be the general law on the subject, and the only exception, as far as decision goes, that I know in modern times, is the decision of Sir John Romilly, in *Saltmarsh v. Barrett*, where he held that an executor who paid the money under a mistake was not liable, though liable to refund the principal, to pay interest on it. If that had been the true view of the law I should have been very glad to follow it, because I am satisfied that cases may occur in which trustees are somewhat severely treated in a court of equity, and have been so. But, in comparing his decision with the higher authorities that I have mentioned, it appears to me the decision cannot be maintained. At least it is one on which I cannot venture to act. If a trustee were excused payment of interest where he acted *bona fide*, according to the decision of Sir John Romilly, I should have a difficulty in dealing with that not uncommon case which

<sup>9</sup> *Supra*.

<sup>10</sup> 24 L. T. Rep. (N. S.) 173; L. Rep. 6 Ch. 152.

occurs where the trustee, in perfect innocence and good faith, makes an investment which turns out not to be authorized. He is ordered then to replace the fund, and to replace the fund with interest from the time the investment was made. I need not go into the details of such a case as that. Of course, if the interest made by the fund is equivalent to four per cent., no question arises; but a question only arises where, as sometimes happens, the investment turns out wholly unprofitable and produces no income whatever. For these reasons, in stating the general principle of the law, I think I am not at liberty to adopt Sir John Romilly's decision."

The learned judge, however, while thus manifesting his construction of the general principle was enabled, on the particular facts of the case, to absolve the executor from payment of the interest. Those facts were very special, and there would not be much practical use in here entering into the details. It will suffice to say that the doctrine applied to them was that an executor will not be charged with interest on payments wrongly made, where the residuary legatee has had the accounts furnished to him, and has been fully aware of the circumstances, and has acquiesced in the erroneous payments. The executor, in fact, appears to have concealed nothing from the person really entitled, who on his part seems to have been fully cognizant of the whole matter. So that there was no resemblance, in this respect, to *Attorney-General v. Alford*, where we find Lord Cranworth saying: "I observe that one of the grounds of misconduct relied upon by the vice-chancellor is, that the defendant did not communicate the matter to the rector and church-wardens (the *cestui que trusts*). This was extremely improper conduct, no doubt, but not in itself such conduct as enables me to make any alteration in the mode in which he is to be dealt with in point of interest. It is not misconduct that has benefited him, unless indeed it can be taken as evidence that he kept the money fraudulently in his hand, meaning to appropriate it." — *Irish Law Times*.

## MANDAMUS—PROCEDURE—PRIVATE CORPORATION—INSPECTION OF BOOKS.

PHENIX IRON CO. V. COMMONWEALTH *ex rel.*

*Supreme Court of Pennsylvania, October 4, 1886.*

1. *Mandamus—Proper Procedure.*—In Pennsylvania the proper procedure upon a petition for a *mandamus* to be directed to the officers of a private corporation, is to require by an alternative writ of *mandamus* the officer to whom the writ is directed, to show cause, if he can, why the prayer of the petition should not be granted and the peremptory *mandamus* issued.

2. *Return of Writ—Traverse of.*—Upon his return to such writ, the plaintiff may demur to the return, or traverse the allegations of fact therein made, and upon the trial of the issue thus made, the peremptory *mandamus* will be issued, or the prayer of the petition be denied.

3. *Stockholders' Rights—Inspection of Books.*—A stockholder in a private corporation has no right to an inspection of the books of the corporation upon considerations of speculation or for mere curiosity, but if he can, in good faith, show to the satisfaction of the court a *prima facie* case of fraud upon the part of the officers of the corporation, operating to his damage or disadvantage, he will be held entitled, upon proper procedure, to a peremptory *mandamus* requiring the officers of such corporation to submit to his inspection the books and papers of the corporation, or so much of the same as are necessary to furnish the information to which he is entitled under the *prima facie* case made out by him upon the trial of the issue made upon the return to the alternative writ of *mandamus*, so that he can use such information in ulterior proceedings at law or in equity.

Petition for *mandamus ex relatione* George H. Sellers against the Phoenix Iron Company and its officers and directors.

The facts appear sufficiently in the opinion of the court.

CLARK, J., delivered the opinion of the court:

This proceeding originated in an application by George H. Sellers for a writ of alternative *mandamus* against the Phoenix Iron Company, a manufacturing corporation, to compel the company to produce for inspection their books and papers, to enable him to prepare a stockholders' bill in equity, in respect of certain grievances, which the relator alleges he has sustained by the fraudulent mismanagement of the affairs of the company. On the hearing of the rule to show cause, the defendants resisted; the application on two grounds: *First*, that there was no right to relief in this form—that the remedy was in equity; and, *second*, if there was such right, the relator was not entitled under the facts. Affidavits were filed in the court below as to the facts, on part of the defendants, and upon argument the writ was refused. The record having been removed to this court, and the refusal of the writ assigned

for error, upon due consideration here the judgment was reversed and the alternative writ allowed. *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111. The plaintiff's case was presented in his petition. The special facts upon which the writ was allowed were fully stated by our brother Trunkey, who delivered the opinion of the court. In some of the States, we believe, the practice is, when the application is by formal petition, setting forth the grounds in detail, to determine the case upon the traverse of the petition, instead of the traverse of the return to the alternative writ (*State v. Union Tp.*, 9 Ohio St. 599); but the practice in Pennsylvania, especially since our statute of June 14, 1836 (*Purd. Dig.* 990), is to hear the case upon the matters alleged in the return.

The 19th, 20th and 21st sections provide as follows:

"Sec. 19. The jurisdiction aforesaid shall be exercised in the manner and according to the rules hitherto observed and practiced in the supreme court of this commonwealth, except so far as the same shall be altered by this act.

"Sec. 20. Whenever any writ of *mandamus* shall issue out of the supreme court, or out of any court of common pleas, the person or persons who, by the laws of this commonwealth, ought to make a return to such [writ] shall make his or their return to the first writ of *mandamus* so issued.

"Sec. 21. It shall be lawful for the person suing or prosecuting any such writ to demur or to plead to or traverse all or any of the material facts contained in such return; and the person or persons making such return shall reply, take issue, or demur; and such other and further proceeding may be had thereon, except as hereinafter provided, as might be had if the person suing such writ had brought his action for a false return."

Upon the rule to show cause the question was upon the sufficiency of the relator's suggestion—his right to the relief prayed for upon the footing of the facts therein stated; and, notwithstanding the latitude allowed in the argument, the opinion filed, and the judgment awarding an alternative writ clearly show that the case was so considered by this court. "Has the relator shown such facts as entitle him to an alternative *mandamus*?" is the inquiry of the learned judge delivering the opinion of the court, and then follows a statement of the facts relied upon, as set forth by the relator.

The proper practice in cases of *mandamus* is very succinctly stated in *Treasurer of Jefferson Co. v. Shannon*, 51 Pa. St. 221, as follows:

"The act of the assembly plainly points out the course to be pursued when a proper suggestion is filed. If it contain the substance of a case for a *mandamus*, the course is to issue an alternative writ commanding the defendant to perform the act required, or return his reason for not doing it. Upon this writ the act provides that the court shall allow the persons suing or defending, such

convenient time to make return, plead, reply, rejoin, or demur as shall be just and reasonable."

If, after issue and trial, the return be adjudged insufficient, then a peremptory *mandamus* will issue to compel the performance of the duty required. The act contemplates regular issues of fact and law, as in other cases. *Barker v. Beeber*, 112 Pa. St. 218; *Keyser's Appeal*, 57 Pa. St. 237. See also *Childs v. Com.*, 3 Brewst. 194. Or, as stated in *Keasy v. Bricker*, 60 Pa. St. 9:

"The ordinary practice is to direct an alternative *mandamus* to issue when the court is satisfied, on affidavits, that the writ should be issued as a matter of justice and right to compel the performance of an act or duty for which otherwise there would be no adequate remedy. This gives the party to whom it is directed an opportunity to do the act, or to show good reason, at the return of the writ, why he should not do it. He does this by making a return to the writ. It is at this point the pleadings in the cause begin. The return may traverse the facts alleged in the writ, or, admitting them, may avoid performance by stating sufficient facts in excuse. The relator may then demur, plead to, or traverse the facts set forth in the return. Such is the ordinary practice recognized by the act relating to *mandamus*."

The alternative writ having been issued and served, the defendants entered of record their return, and the sufficiency of that return is, by the demurrer, made the specific question for determination now. *Com. v. Commissioners Allegheny Co.*, 32 Pa. St. 221. In *mandamus* the relator must in all cases establish a specific legal right, as well as the want of a specific legal remedy. *Com. v. Rosseter*, 2 Binn. 362.

When this cause was here before we held that, in the absence of any restriction in the charter, the right of a stockholder in a trading corporation to an inspection of the books, papers, and accounts was, in certain cases and under certain limitations, incident to the relation of a stockholder to the company. Of course, a stockholder is bound by the corporate articles. Where the right of inspection of the corporate books and papers is qualified by express stipulation, those who become members are subject to the qualification. But the doctrine of the law, as we then said, "is that the books and papers of the corporation, though of necessity left in some one hand, are the common property of the stockholders," and, "unless the charter provides otherwise, a shareholder has the right to inspect them, and to take minutes from them for a definite and proper purpose, at reasonable times." The facts set forth in the writ are by the return in part denied, in part qualified, and in part admitted; but assuming the correctness of the return as far as it goes, and the facts set forth in the petition not traversed thereby, the following facts may, we think, for the purposes of this case, be deemed admitted:

The Phoenix Iron Company was incorporated April 27, 1855, for the purpose of engaging in

mining and manufacturing iron, etc., with a capital stock of \$500,000, divided into 5,000 shares of \$100 each. The relator, on the twenty-ninth November, 1866, became the owner of 238 shares of said stock, paying therefor \$38,500, and he still owns 235 of the said shares. David Reeves and William H. Reeves, at the time of the filing of the petition, either individually or jointly, and as trustees, were, and for several years had been, the holders of and controlled nearly all of the remaining shares. The number of shares held in trust was 2,875. These shares were held for the children of Samuel J. Reeves, deceased, viz., Elizabeth H. Carson, Clara R. Tyson, Jennie J. Reeves and the said David and William H. Reeves, each being entitled to one-fifth of 2,875 shares, or 575 shares. Since these proceedings were instituted, these trust shares have been divided, and transferred to the several persons entitled. David Reeves and William H. Reeves, however, severally and jointly, are still the owners of 2,033 of said shares. The board of directors consists of five persons: David Reeves, president, William H. Reeves, Carroll S. Tyson, John Griffin, and George Gerry White, the last three named being each the owner of but a single share of stock.

The works of the company are among the most extensive in the country, and the business, during the whole period of its existence, has been in a highly prosperous condition. The business of the company from 1870 to 1880 averaged \$2,000,000 per annum. In 1879 it amounted to \$2,705,036.11, and in 1880 to \$2,448,668, and the average profit upon this trade is estimated to be at least 15 per cent. The charter of the company provides for dividends of the actual net profits, to be declared at the discretion of the directors, but no dividends have been declared for a period of nine years. The capital stock represents an investment of about six times its par value, but the real estate of the corporation is still subject to a mortgage of \$1,150,000, while a portion has been recently conveyed to secure an alleged indebtedness of \$322,000, in which the said David and William H. Reeves are themselves interested. The business of the Phoenix Iron Company, prior to 1868, had been engaged, not only in the manufacture of iron materials for bridges, viaducts, etc., but for the erection of such structures.

The firm of Clarke, Reeves & Co., consisting of Thomas C. Clarke, David Reeves, Jr., John Griffin, and others, was engaged, as engineers and contractors, in designing and erecting structures made partially or wholly from iron materials, such as the Phoenix Iron Company made. In the year 1868, the Phoenix Iron Company ceased to act as iron builders, and, excepting in one or two instances, confined its operations to the manufacture of iron building materials. In October, 1870, the Phoenix Iron Company entered into an agreement with Clark, Reeves & Co., by the terms of which the company agreed and became bound permanently to withdraw from the business of construction, and to confine their operations to the manu-

facture of materials alone. Clarke, Reeves & Co., on the other hand, agreed and became bound to pursue the business of construction; to purchase, at certain rates, their materials wholly from the Phoenix Iron Company, and at the completion of each contract to pay to the Phoenix Iron Company one-half of the net amount which they might receive by reason of the contract. This contract, originally in parol, took effect from October 22, 1870, but was not reduced to writing until May 21, 1871. At the time it was originally agreed upon, no member of the firm of Clarke, Reeves & Co. had any interest in the corporation. The shares were then held as follows: David Reeves, the elder, 2,500; Samuel J. Reeves, 2,262; George H. Sellers, 238. Nor did the relator, who was then consulted in the matter, make any objection to it. Since that time, however, he has not been at any time consulted as to the renewal of the contracts from year to year. David Reeves, the elder, died in March, 1871, however, and David Reeves, the younger, who was of the firm of Clarke, Reeves & Co., became entitled, as legatee, to 50 shares. Until December, 1878, none of the firm of Clarke, Reeves & Co. had any of the corporate shares of the Phoenix Iron Company, excepting David Reeves, who had the 50 shares mentioned, and John Griffin, who, at the request of David and Samuel J. Reeves, held one share each.

In December, 1878, Thomas J. Reeves died, and thereafter David Reeves and W. H. Reeves, his sons, held the controlling interest in the company, and it is charged that through their votes, and those of the other directors whom they elect, and who have but a merely nominal interest in the corporation, they have and exercise absolute control over all the affairs of the corporation, and that they unjustly and intentionally manage it in such a way as to advance their own personal interests, to the injury of the relator; that the officers and directors of the corporation have abused the discretion conferred upon them in refusing to declare dividends of the profits, as contemplated in the charter; that the profits and estate of the corporation are illegally absorbed by the individuals who control it—in part through the instrumentality of the contract with Clarke, Reeves & Co., in part by voting themselves large salaries, in part by the conveyance to themselves in trust, with power of sale, of a large portion of the real estate of said corporation to secure indebtedness in which they are themselves immediately interested, and otherwise. At a meeting of the stockholders, Sellers asked for information as to the affairs of the company, and the directors refused either to permit the minutes to be read, or the papers to be examined. His request to the president that a time and place might be named for such an examination of the books as would give him the information proper to a stockholder was refused, and a similar demand, made of the officers and directors at the office of the corporation, during business hours, was in like manner

refused. The relator states that his purpose is to file a bill in equity to obtain relief against the abuses complained of.

Under the circumstances mentioned, and for the purposes stated, we are of the opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity, or for speculative purposes, but in good faith, and for a specific, honest purpose, and where there is a particular matter in dispute involving and affecting seriously the rights of the relator as a stockholder.

We cannot say that the matters involved have already been adjudicated in the decree of the circuit court of the United States. We cannot anticipate the bill which the relator may bring. What specific relief he may seek can now only be the subject of conjecture. It will be time enough to determine the question of *res adjudicata* when the case is presented. The question now is as to the relator's right to inspect the books. He avers that he proposes filing a bill in equity against the corporation and its officers, and that it is necessary that he see the books and papers in order that he may correctly state the facts now concealed from him. As we said in the former opinion of this court, upon learning the facts, he may abandon his purpose for want of matter of complaint. He desires "to inspect and see whether he can raise a particular case in his favor by examining the books." He is a stockholder, to a very considerable amount, in what appears to be a prosperous and highly profitable trading corporation. For nine years, although large profits have admittedly accrued, no dividends have been declared. The profits are in no way accounted for. He is denied all access to the books and papers for information. At a regular stockholders' meeting the minutes, because of his presence, were suppressed, the examination of papers prevented, and the meeting adjourned while the relator held the floor asking for information. A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he proposed to bring.

The relator, we think, has a clear right, under the writ and return, to the relief he asks; and it is plain he has no specific legal remedy for the enforcement of that right, and the existence of a supposed equitable remedy is not a ground for refusing the *mandamus*. *Com. v. Commissioners Allegheny Co.*, 32 Pa. St. 223. The requirements of the writ, of course, can cover only such books and papers as are actually in exist-

ence, and only such of those as may contain information upon the subjects specified.

The judgment is affirmed.

**NOTE.—Right of Stockholders to Inspect Books and Papers.**—Although the cases on this interesting topic are few in number, yet they are entirely harmonious in their rulings, and have settled the general rule in such a manner that its application to any given case must be a matter of easy deduction. The principle is, that a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, for a definite and proper purpose, at any reasonable time; and that if he is denied this privilege, the courts will lend him their authority by the process of *mandamus*. This right is not a statutory one; it rests on the common law. The doctrine of the law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders. At the same time, the right may be limited or restricted by the charter of the company, to which every shareholder assents, or by statute.<sup>1</sup> Mr. Morawetz says: "In the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management."<sup>2</sup> But still there must be a proper motive for the inspection. It must not be for the purpose of gratifying mere curiosity, nor because of a general dissatisfaction with the management of the concern, nor to use the information for improper or fraudulent ends, nor to see if some complaint or charge cannot be trumped up against the corporate body. "It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is entitled, and in respect of which the examination becomes necessary."<sup>3</sup> Thus, in *Rex v. Merchant Tailors' Co.*,<sup>4</sup> decided half a century ago, it was held that the court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of the corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection then will only be granted to such extent as may be necessary for the particular occasion; and the writ was refused, because the applicants merely alleged grounds on which they believed the affairs of the corporation were improperly conducted, and the officers unduly chosen, and complained of mismanagement in some particular instances not affecting themselves or any matter then in dispute."<sup>5</sup> In *Martin v. Oil Works*,<sup>6</sup> it was ruled that a stockholder of a corporation has a right to know how its affairs are conducted; that the board of directors, authorized by the charter to exercise all the powers of the corporation, could not rightfully deprive him of personal inspection of

<sup>1</sup> See *Com. v. Phoenix Iron Co.*, 105 Pa. St. 117; *Union Bank v. Knapp*, 3 Pick. 96, 108; *People v. Throop*, 12 Wend. 183; *Deaderick v. Wilson*, 8 Baxt. 108; *State v. Einstein*, 46 N. J. L. 479; *Union Bank v. Hunt*, 76 Mo. 489; *Wannell v. Kern*, 57 Mo. 478; *Angell & Ames on Corp.*, § 681; *Redfield on Railw.* 227; *Grant on Corp.* 311; 2 *Phillips on Ev.* 318; 1 *Whart on Ev.*, § 746.

<sup>2</sup> 1 *Morawetz on Priv. Corp.*, § 473.

<sup>3</sup> 2 *Addison on Torts*, § 1496.

<sup>4</sup> 2 B. & Ad. 115.

<sup>5</sup> *Com. v. Phoenix Iron Co.*, 105 Pa. St. 117. And see *Rex v. Hostmen*, 2 Stra. 1223; *Re Burton*, 31 L. J., Q. B. 62.

<sup>6</sup> 28 La. Ann. 304.

the books and papers, that he might learn the condition and affairs of the company, so that he could vote understandingly at a meeting of the stockholders. But it may be questioned whether this case does not overstep the rule. A shareholder in a joint-stock company is not entitled to an inspection of the books for the purpose of proving a plea of justification in an action against him for libel, imputing insolvency to the company.<sup>7</sup>

**Right to Take Copies.**—Where a statute gives a stockholder the right to inspect the books in which the transfers of stock are registered, and the books containing the names of the stockholders, within thirty days previous to an election of directors, this gives him also the right to take a copy or memorandum of the names of the stockholders, this being necessary to make the information to which he is entitled available for his use.<sup>8</sup>

**What Books and Papers.**—The right only extends to such documents as are necessary to the stockholder's particular purpose. A demand of an inspection of all the books, records and papers of the company is too broad.<sup>9</sup> But, under a statute providing that the stock and transfer books of incorporated companies shall be open to examination of stockholders, a stockholder cannot be denied the right to inspect them because they are kept in a particular way, nor because they contain, besides the information to which he is entitled, other information which he has no right to demand; and if the corporation does not keep the books which the statute prescribes, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statutes give the stockholders the right to know.<sup>10</sup> Unless restricted by the charter, or by rules or by-laws passed in conformity thereto, a stockholder in a banking company has a right to inspect the "discount book" of the bank, within proper and reasonable hours.<sup>11</sup>

**Proper Demand.**—To entitle the stockholder to the aid of the court, he must show a proper demand made by him upon the custodian of the corporate records and documents, at a proper time and place and for a proper reason, which has been refused; the application must be shown to have been made at the office of the company during proper business hours, or a reason for its not having been made there must be shown.<sup>12</sup> In an action against a corporation to recover the penalty provided by statute for refusing an inspection of the stock-book of the company, the complaint must show that the officer upon whom the demand for inspection was made, had notice that the person making the demand was entitled to the inspection.<sup>13</sup>

<sup>7</sup> Metropolitan, etc. Co. v. Hawkins, 4 Hurl. & N. 146.

<sup>8</sup> Cothel v. Browner, 5 N. Y. 562; 10 Barb. 216.

<sup>9</sup> People v. Walker, 9 Mich. 328. And see Regina v. Maraquita Co., 1 Ellis & E. 289.

<sup>10</sup> People v. Pacific Mail Co., 50 Barb. 280.

<sup>11</sup> Cockburn v. Union Bank, 13 La. Ann. 289.

<sup>12</sup> People v. Walker, 9 Mich. 328.

<sup>13</sup> Williams v. College, 45 Ind. 170.

## CRIMINAL LAW—SUMMONING AND SELECTION OF JURY—SHERIFF DISQUALIFIED—DEFENDANT'S PRESENCE NECESSARY.

### STATE V. CROCKET AND SMITH.

Supreme Court of Missouri, Nov. 15, 1886.

1. **Coroner to Summon Jury When Sheriff Disqualified.**—When the sheriff of the county is disqualified from acting in summoning the jury by reason of his prejudice against defendant, the court errs in selecting another person, other than the coroner, to summon the jury, where it is not suggested that the latter is disqualified.

2. **Defendant Must be Present When Jury is Impaneled.**—Upon a trial for a felony, it is error to permit the jury to be impaneled in absence of the defendant, although his counsel was present, and although the defendant was voluntarily absent, being out on bail, and although, when the trial was called, the court gave defendant an opportunity to further examine the jurors.

3. **Defendant Must be Present at Each Step, Except Voluntarily Absent at Time of Receiving and Entering Verdict.**—§ 1891 R. S. Mo.—Under § 1891, R. S. Mo., 1879, in all cases of felony it is necessary that the defendant should be personally present in court at each and every material step taken during the trial up to the time the verdict is to be received, when the verdict may be received and entered in his absence if the same is willful or voluntary.

Appeal from Audrain county.

George Robertson, for appellant; B. G. Boone, attorney-general, for the State.

The facts appear sufficiently in the opinion of the court:

RAY, J., delivered the opinion of the court:

Defendant Ann Crocket was indicted at the June term, 1883, of the Audrain circuit court for arson, and the other defendants, Smith, Redman and Glover, were jointly indicted with her for inciting, etc., her to commit the offense. At said term the prosecuting attorney entered a *nolle* as to the defendant Ann Crocket. A severance was taken, and a separate trial of the defendant Smith at the October term resulted in the failure of the jury to agree.

At said first trial, defendant made affidavit against the sheriff and his deputy charging them with prejudice against him, and the court thereupon appointed one Dobyns to summon the special venire, and said Dobyns acted in that behalf at the first trial of the cause. At the January term (when the second trial occurred and this conviction was obtained), said Dobyns declined to further act, and the court thereupon (against the objection of the defendant) appointed one Joseph James, who was not the coroner of the county, to act in this behalf. Defendant renewed his said objection to the appointment of said James, and his authority to summon the jury, by filing his motion to quash the panel upon said ground, among others, that the court having found the sheriff disqualified to act in summoning the jury,

by reason of prejudice against the defendant, the coroner of the county was the only officer designated by the statute to act in this behalf in the place of said Sheriff. Secs. 3893, 3894, 3895, Rev. Stat. 1879.

This motion was overruled, and this action of the court is assigned and urged here as error.

At common law, the coroner was authorized to perform the duties devolved on the sheriff in summoning a jury, whenever the sheriff was incompetent to act, and in this event the process of the court was directed to the coroner instead of the sheriff. If it was suggested or made to appear that the coroner was also disqualified, then the court appointed persons of its own nomination, called *elisors*, to act in that behalf.

Said *elisors* were particular officers of the court, acting under its special authority.

Sec. 3894, Rev. Stat., provides that "every coroner within the county for which he is elected or appointed shall serve and execute all writs and precepts and perform all other duties of the sheriff, when the sheriff shall be a party, or when it shall appear to the court out of which process shall issue, or to the clerk thereof in vacation, that the sheriff is interested in the suit related to or prejudiced against any party thereto, or in any wise disqualified from action."

Sec. 3895 authorizes the coroner to perform the duties of the office of sheriff whenever the same shall be vacant by death or otherwise, until another sheriff shall be appointed and qualified.

In the case at bar, it was not made to appear, or even suggested, that the coroner of said county was under any disability to act in the matter of summoning the jury, and, under this state of facts, the sheriff being thus disqualified and removed, the coroner was the proper officer, both at common law and under the statute, to act in that behalf.

We have been referred to a class of cases holding, in effect, that the capacity of an officer, such as a sheriff, duly commissioned and acting as such cannot be inquired into collaterally upon a motion to quash the venire; but these cases are, we think, not applicable.

The plain purport of the statute is to substitute the coroner for the sheriff, in respect to the duties of such officer, whenever the contingencies contemplated arise; and where the law thus devolves the performance of such duties upon a designated officer, they are not authorized to be performed by another officer, or any different person, without, at least, some suggestion of disability on his part, except in the cases and upon the terms provided in section 3893, Rev. Stat.

In executing the special venire, the officer exercises the power of selection confided to the sheriff at common law, and the character of the officer performing this duty is important and material, and if such duty is performed by an officer not authorized, this is, we think, a good ground of challenge to the array. Thompson and Merriam on Juries, p 115; State v. Newhouse, 29 La. p 824.

As one of the contingencies contemplated by the statute had arisen, and the court upon that ground had removed the sheriff, the special venire should, we think, have been directed to the coroner of the county, as provided by the statute, in the absence at least of any suggestion of inability on his part for any cause to act in that behalf. Another error complained of is, that the defendant was not present in court whilst the jury was being impaneled and examined as to their qualifications to sit as jurors in the cause. The facts in this behalf, as the same appear in the record before us, are as follows:

The defendant was not in court, except by his counsel, when the *venire facias* was issued, nor when it was returned by said James, nor when the jury was examined on the *voir dire*, nor at any time during the proceedings in said cause, till the jury was called to try the same on the 8th, day of February 1884, at one o'clock p. m., which was four days after the venire was issued, and forty-eight hours after said jury was examined on the *voir dire*; but at the expiration of the forty-eight hours from the time the copy of the list of jurors was served on the defendant, and before the State or the defendant was required to make challenges, the said panel of jurors being present in the court, and the defendant in person also being present, and his attorney also, the court then informed defendant and his counsel that they now had an opportunity to make such further examination of the jurors as they might deem proper; whereupon defendant's attorney said they would then demand an additional forty-eight hours before making their challenges, which the court refused to give, and defendant's counsel thereupon declined to make such further examination of the jurors. Before exercising his right of peremptory challenges defendant filed his motion to quash the panel upon said ground of his absence as aforesaid, which the court overruled, and defendant excepted. The question thus presented involves a construction, in connection with this state of facts, of section 1891, Rev. Stat., which provides that: "No person indicted for a felony can be tried unless he be personally present during the trial, \* \* \* that in all cases the verdict of the jury may be received by the court and entered upon the records thereof in the absence of the defendant, when such absence on his part is willful and voluntary; \* \* \* and that when the record in the appellate court shows that defendant was present at the commencement or any other stage of the trial, it should be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial."

At common law, if the accused was in such cases absent, either in person or by escape, there was, by reason of his said absence, a want of jurisdiction over the person, and the court could not proceed with the trial or receive the verdict or give judgment. Cooleys Const. Lim. p. 390.

But, under the statute, if the absence of the de-

fendant is willful and voluntary, the court is authorized to receive and enter the verdict, and this by the express terms of the statute, the only action the court is authorized to take "during the trial," where the same is for a felony, unless the accused is "personally present."

In other words, the statute means, we think, that in all cases of felony it is necessary that the defendant should be personally present in court at each and every material step taken during the trial up to the time when the verdict is to be received, when the particular steps mentioned in the statute, of receiving and entering the verdict may be taken during his absence, if the same is willful and voluntary.

Impanelling and examining the jury is, we think, manifestly a material, substantive and important step "during the trial," within the meaning of this section. As was said in the case of *Hopt v. People*, 18 Cent. L. J. p. 271, which involves, we think, the same principle and question as the one at bar, "the prisoner is entitled to an impartial jury composed of persons not disqualified by the statute, and his life and liberty may depend upon aid which by his presence he may give to counsel and court in the selection of jurors. The necessity of defense may not be met by the presence of his counsel only. For every purpose involved in the requirement that defendant shall be personally present where the indictment is for a felony, the trial commences at least from the time when the work of impanelling a jury begins."

In the case at bar, the accused was out on bond and not in prison or custody; but this, we think, under the statute, makes no difference, even if we must infer, as suggested by counsel, that his said absence was voluntary on his part. As already said, if his absence is willful and voluntary the verdict may be received and entered of record, for the reason that these steps during the trial are expressly authorized by the statute, but the expression of authority thereon to do these particular acts must be held to exclude all authority to take any other step "during the trial," unless the accused is personally present. This requirement of the statute is one he cannot waive. It is not made for his benefit only, and his rights are not all that is involved or contemplated in said enactment. In the case already cited, the court further says: "We are of the opinion that it is not within the power of the accused or his counsel to dispense with the statutory requirements as to his personal presence. The argument to the contrary proceeds upon the ground, that he alone is concerned as to which he may be deprived of, life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relation which the accused holds to the public as of the end of human punishment \*\*\*. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in pro-

ceedings involving the deprivation of life or liberty can not be dispensed with or affected by his consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods. \*\*\* Such being the relation which the citizen holds to the public and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life is involved in a prosecution for felony that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution."

To the same effect is the line of cases to which we have been referred, decided in the supreme court of Arkansas. See *Osborne v. State*, 24 Ark. 629; *Brown v. State*, 24 Ark. 620; and earlier cases in same court cited in cases just mentioned. But it is contended for the State that this omission is cured by the subsequent offer of the trial court when the case was called for the purpose of making peremptory challenges and proceeding with the trial, to allow the accused to then examine the jury as to their qualifications, and that as he declined to do so at this time none of his substantial rights were affected prejudicially.

But this view is, we think, not satisfactory for a variety of reasons. In the first place, examine the jurors when the accused was not personally present, was not merely an irregularity in the mode and process of impanelling the jury, as to which a large discretion is allowed the trial court, and whose action it is said will not as to such irregularities be reviewed, unless some actual prejudice to the defendant is made to appear; but on the contrary, the examination conducted in his absence, as we have seen, was a breach and infringement of the statute requiring the accused to be personally present at this step during the trial, and this in and of itself, and as a matter of law, sufficiently shows the prejudice, or, in other words, prejudice to the rights of the accused, is under such circumstances, presumed, without any showing in that behalf.

The court upon discovering the absence of the accused during said examination, doubtless thought it could give the defendant the full benefit of his substantial rights by permitting him to then and there examine the jurors as to their qualifications; without discharging the entire panel, or without allowing any further period of time as demanded by defendant, before requiring the exercise by the parties of their peremptory challenges.

But the examinations of jurors as to their qualifications as such does not, we think, consist altogether or exclusively in their examination in said respect by the accused, or his counsel, which is the extent of said offer so made by the court. Their examination by the prosecution attorney, or by the court, or both, as to their qualifications

under the statute, and such further examination, if any, became necessary or proper in the examination of the case, as to other cause of disqualification than those mentioned in the statute, and such other examination made by the State's attorney, if any, with a view to the exercise of his peremptory challenges, all constitute a part, or may do so, of the examination and trial of the jurors in this behalf. The opportunities for observing the conduct and bearing and manner of the juror throughout the whole examination, as well that by the State as that on his own behalf, may be of great value to the accused.

The accused has opportunities thus afforded for inquiry and for comparison, and for inspection of the jurors personally as they thus undergo the examination as a whole. The practice at common law required the examination of the jurors singly, so that the accused should not be confused "by looking upon a multitude of faces at once," but might have opportunity to scan the countenance and observe the demeanor of each separately. But whether this practice prevails or not, it is the intention and aim of the law to provide liberal facilities and opportunities for securing a fair and impartial jury.

Even if the time and facilities intended to be provided by the law for the selection of the jury were not in fact abridged by this action of the court, there has been an infringement of the statutory requirement that the accused should be personally present during the trial, for the jury had been in part examined touching their qualification during his absence. This was, we think, a ground of challenge to the array, and as the defendant was insisting upon his right under the statute to be personally present during this part of the trial, his said motion should have been sustained upon this ground.

For the reasons above stated, we are of the opinion that the trial court erred in overruling defendant's motion, above complained of, and for that reason its judgment is reversed and the cause remanded for further proceedings, in conformity thereto.

All concur, except HENRY, C. J. not sitting.

NOTE.—The proper practice in summoning juries in case of the incompetency of the sheriff, duly ascertained by the court, is at common law very clearly settled, and the Missouri statute in effect merely reproduces and restates the rule. The only ministerial duty of the coroner is to act in proper cases as the substitute, not the deputy, of the sheriff, and to execute all such process as it would have been the duty of the sheriff to execute if he were competent to do so. The coroner cannot execute process directed to the sheriff.<sup>1</sup> Upon the same principle an ex-sheriff cannot act upon a writ directed generally to "the sheriff,"<sup>2</sup> or by name to his successor,<sup>3</sup> although the subject-matter and the character of the process be such that it might well have been directed to the ex-officer,

who could have lawfully executed it. The rule is very clear that it is essential not only that legal process shall be issued by competent authority and for a lawful purpose, but must also be directed to the proper official person who alone can perform the duty either himself or in proper cases by his lawful deputy. And the rule applies to every variety of precept or process issuing from a court in civil, and *a fortiori*, in criminal cases.

In the principal case, therefore, it is very obvious that the trial court exceeded its authority in passing over the coroner and issuing its precept to a private person, it not appearing that the coroner was disqualified or unable to discharge the duty which devolved upon him by reason of the disqualification of the sheriff.

If, therefore, the trial court erred in issuing the *venue* to an unsuitable person, it is manifest that the panel should have been quashed in accordance with the motion of the defendant, and that the jury so summoned by that private person in accordance with the void process so issued was simply no jury at all.

The law of Missouri provides<sup>4</sup> that no person indicted for a felony can be tried unless he is personally present during the trial. To this rule some exceptions are made by the statute as where his absence is willful, but the rule itself is in full accord with the general law prevalent elsewhere. The prisoner must be present at the arraignment, and indeed throughout the trial.<sup>5</sup> "In indictments and informations," said Eyre, J., "no judgment can be given unless the defendant appears."<sup>6</sup> In cases of misdemeanor, it is true, the rule is less rigid, but in felony cases the personal presence of the defendant is required, even when minor and incidental matters are under consideration. A motion for a change of venue may be made and decided in the defendant's absence, in Missouri;<sup>7</sup> in Alabama such an order cannot be made unless the defendant is present.<sup>8</sup> The court says: "This right" (to be heard by himself and counsel) "is without any limit and without any exception when the step is not one of mere discretion in the court, such as a motion for a continuance, when the accused fails to be present, and orders of a like character. This is a constitutional provision in his favor and cannot be disregarded by the court."<sup>9</sup> And, in Mississippi, it has been held that upon a motion to quash an indictment for felony, the record must show affirmatively the personal presence of the defendant.<sup>10</sup>

In some States it has been held that the counsel of the defendant cannot waive his right to be present during his trial or at the rendition of the verdict for a felony;<sup>11</sup> and, further, that the right of the defendant to be present on the occasion is "inherent and inalienable," or, in other words, that he himself cannot waive that right. There is a similar ruling in Alabama.<sup>12</sup> In a Virginia case, the language is very positive on this subject: "No principle is supposed to be better settled, and, in all criminal trials of the grade of felony, more rigidly adhered to than in all such trials the prisoner has a right to be present in every stage from the arraignment to the rendition of the verdict. It is held to be a right of which he cannot be deprived and which

<sup>4</sup> 1 Rev. Stat. Mo. (1879) § 1891.

<sup>5</sup> Younger v. State, 2 W. Va. 579.

<sup>6</sup> Reg. v. Simpson, 10 Mod. 248, 250.

<sup>7</sup> State v. Elkins, 63 Mo. 159.

<sup>8</sup> *Ex parte Bryson*, 44 Ala. 401.

<sup>9</sup> State v. Hughes, 2 Ala. 102; Henry v. State, 33 Ala. 102; Hall v. State, 40 Ala. 698.

<sup>10</sup> Long v. State, 52 Miss. 23. See also Stubbs v. State, 49 Miss. 724; Scaggs' Case, 8 Smed. & U. 726; Price's Case, 36 Miss. 542.

<sup>11</sup> Price v. Commonwealth, 18 Penn. St. 103.

<sup>12</sup> Waller v. State, 40 Ala. 325.

<sup>1</sup> Weston v. Coulson, 1 W. Blackst. 506; Brown v. Barker, 10 Hump. 346.

<sup>2</sup> Tarkington v. Alexander, 2 Dev. & Batt. L. 91.

<sup>3</sup> Spruill v. Bateman, 4 Dev. & Batt. L. 489.

he cannot waive. So imperative is the rule that no part of the trial can proceed without him."<sup>13</sup> In Tennessee,<sup>14</sup> the court says: "In criminal cases of the grade of felony \* \* \* he (the accused) has the right to be present, and must be present during the trial and until the final judgment." In Georgia, it is said that it is the legal right and privilege of the defendant to be present in court, and he must be considered as "standing on all his legal rights, waiving none of them."<sup>15</sup> In Wisconsin, the rule is somewhat less rigid than heretofore stated. It is conceded that the defendant in felony cases has a right to be present throughout the trial, but it is held that he may waive that right, either explicitly or by his willful absence. The court argues, that as he may waive any trial at all by pleading guilty he may waive, as well as the greater, any minor right that he may possess.<sup>16</sup> In Ohio, it is held that it is not error to permit a verdict to be rendered in the absence of defendant, unless that absence is caused by imprisonment or other improper means.<sup>17</sup> And in Indiana the court decides that the constitutional and legal right of the prisoner to be present throughout the trial confers a privilege which he may waive. The court says: "He can waive a trial altogether, and plead guilty. He can waive the constitutional and legal privileges of trial by jury."<sup>18</sup>

Upon a review of the whole subject, it is manifest to us that the weight of authority is with the supreme court of Missouri in the principal case.—[EDITOR CENT. L. J.]

<sup>13</sup> Jackson v. Commonwealth, 19 Gratt. 656, 668, 664.

<sup>14</sup> Andrews v. State, 2 Sneed, 550. See also Witt v. State, 5 Cold. 11.

<sup>15</sup> Wade v. State, 12 Ga. 25. See also People v. Perkins, 1 Wend. 91; Rex v. Streek, 2 Carr. & P. 413.

<sup>16</sup> Hill v. State, 17 Wis. 675.

<sup>17</sup> Wilson v. State, 2 Ohio St. 319. See also Rose v. Ohio, 20 Ohio, 33.

<sup>18</sup> McCorkle v. State, 14 Ind. 39.

## USURY — BROKER — COMMISSIONS — FEES FOR SERVICES.

### MACKEY V. WINKLER.

*Supreme Court of Minnesota, September, 30, 1886.*

An agent or broker who undertakes to procure a loan for a borrower of money, may charge and receive from him a reasonable sum for commissions, as well as for services in the examination of the property by which the debt was secured, and, although such broker be also the agent of the lender to lend the money, the commissions, etc., so received by the agent cannot be regarded, as against the lender, as an usurious addition to the interest, unless it appears that the sum so charged was paid to him by such broker.

BERRY, J., delivered the opinion of the court: The plaintiff, Safford Mackey, who resides in Wisconsin, was in the habit of sending money to F. J. Mackey, a loan broker doing business in St. Paul and Minneapolis, to be loaned out by him, and under his direction, at ten per cent. interest. The loans were made in plaintiff's name, and for him, but plaintiff paid F. J. Mackey

nothing for his services. On December 9, 1884, defendant made to F. J. Mackey a written application, which, so far as here important, is as follows: "I \* \* \* hereby apply to F. J. Mackey to act as my agent to procure for me a loan of \$367.50, for one month, with interest at ten per cent. per annum, to be secured by chattel mortgage on personal property owned by me, \* \* \* and described in a certain chattel mortgage executed by me, and bearing even date herewith; and I agree to pay same F. J. Mackey, for acting as my agent in procuring such loan, and for examining said property, and drawing the necessary papers to perfect such loan, if he is able to procure the same, the sum of \$17.50. He is to charge me nothing for examining said property, or for his services of any kind, unless he procures said loan for me."

Pursuant of the application, F. J. Mackey made a loan to defendant, taking his note, payable to plaintiff, for \$367.50, and as security for the same a chattel mortgage upon furniture and fixtures belonging, as we infer, mostly, if not altogether, to a Turkish bath establishment; handing to plaintiff \$350 of said sum in cash, and retaining for his own personal benefit \$17.50. The court finds that "the said F. J. Mackey charged the defendant a commission of \$17.50 for procuring the loan, examining the property on which the security was to be given, drawing papers and the like, which commission it was agreed was to go to, and which did go to, the said F. J. Mackey personally, and none of it went to plaintiff; nor did he (the plaintiff) know anything about it, or how the said F. J. Mackey remunerated himself for expense and time in his business as a loan broker, the said plaintiff never at any time receiving over 10 per cent. on his loans."

Upon the foregoing state of facts we agree with the trial court that the note and mortgage are not shown to be usurious. The sum of \$17.50 does not appear to have been taken for the loan and forbearance of the \$350, but as a commission for services performed for the borrower. There is no evidence and no finding by the trial court that the commission was an excessive or unreasonable charge for the services performed for the borrower. See *Bonus v. Trefz*, 2 Atl. Rep. 369. No part of it went to the plaintiff—the lender of the money—but it was not contracted for, charged, and taken by F. J. Mackey for his own exclusive use. These facts appear to bring the case within *Acheson v. Chase*, 28 Minn. 211, s. c., 9 N. W. Rep. 734, and to distinguish it from *Avery v. Creigh*, ante, 154, (April term, 1886).

VANDERBURGH, J. (concurring): I agree that, upon the facts found, the case may fall within the rule laid down in *Acheson v. Chase*. At the same time it seems to me that it leaves the door open for a practical evasion of the usury law in many cases. But it would be better, undoubtedly, that a rule which has been recognized and acted on should be changed by legislation, which would, of course, relate to future contracts only, than

that an attempt should now be made to change it by the courts. I therefore concur in the opinion.

NOTE.—Where one person authorizes another to act as his agent in securing a loan and contracts to pay such agent for his services what they are reasonably worth, or a bonus in addition thereto, and such person, acting solely as the agent of the borrower, secures the loan and exacts from the borrower a sum sufficient to make the total rate of interest paid more than the highest legal rate, the contract with the lender is not usurious when the amount to be received by him is within the legal rate, and he does not share in the amount paid the agent.<sup>1</sup>

A contract by which the borrower is to pay his agent for his services what they are reasonably worth, though in addition to the highest legal rate of interest to be paid the lender, is not usurious.<sup>2</sup> And that the borrower's agent divides his commission with the lender's agent will not, it has been said, taint the lender's contract with usury.<sup>3</sup> In one case it was held that the fact of the borrower's agent having divided his commission with the lender would not necessarily have such an effect.<sup>4</sup>

It has been held that, where the lender or his agent is put to expense in collecting the means for making the loan or in traveling to examine the security, and the borrower agrees to pay for such services in addition to the highest legal rate of interest on the loan, the taking of a fee for such services, when reasonable, will not render the contract usurious.<sup>5</sup>

Whether the taking from the borrower by the lender's agent of a commission or bonus in addition to the highest legal rate of interest to be paid the lender will taint the transaction with usury, is not very well settled. If, at the time of making the loan, the lender has knowledge of the bonus paid his agent, doubtless the transaction should be declared usurious.<sup>6</sup> But it is in cases where the lender's agent, without the knowledge or authority of his principal, receives such a bonus, of which the lender receives no part, that the greatest contrariety of opinion prevails. In *Palmer v. Call*,<sup>7</sup> *McCrary, J.*, said: "It is well settled that to make a loan usurious there must be an intent on the part of the lender to take more than the legal rate of interest. \* \* \* Doubtless in general the intent of an agent, acting within the scope of his authority, may be imputed to the principal. But it is settled beyond question, that if any agent in good faith makes a loan for another and without the knowledge or authority of his principal and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious. In such case the law does not impute the knowledge and the intent of the agent to the principal."

pal." The above opinion seems to be the one prevailing.<sup>8</sup>

On the other hand, the supreme court of Nebraska, in *New England Mtge. Security Co. v. Hendrickson*,<sup>9</sup> said: "It is said, however, that the principal is not bound by the acts of the agent when he exceeds his authority—that is, when he charges more than lawful interest or retains a portion of the principal, as in the case as a bonus. It is a sufficient answer to this objection to say that the agent is selected by the principal for the purpose of loaning its funds. The principal may require such security and impose such conditions upon such agent as it sees fit, and has the means at hand to protect itself from the illegal acts of its own employer."

And, again, in *Cheney v. Eberhardt*,<sup>10</sup> the same court declared: "We hold it to be a salutary rule, and one that should be rigidly applied in all proper cases, that where one who is intrusted with the business of loaning money exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the rate permitted by statute, the transaction is usurious, and will be judged accordingly."

The latter doctrine appears to have found favor with other courts, though it cannot be said to prevail.<sup>11</sup>

Where it is the duty of the agent to examine the security and title, and he is intrusted with the interests of the lender in the transaction, and is responsible to the lender for mistakes, he is the agent of the lender; and when he secures for his principal the highest legal rate of interest with the understanding that he is to look elsewhere for compensation, the lender should be held bound to know of the acceptance by his agent of a bonus and the loan be declared usurious;<sup>12</sup> and a mere recital in the application for a loan that the agent acts as the agent of the borrower, and not of the lender, will not change the real character of the transaction.<sup>13</sup>

In applying the doctrine that a lender is bound to know whether his agent accepts a bonus in addition to legal interest, a distinction has been made in some cases between a special agent engaged in making a particular loan, for whose action outside his authority the principal is not liable, and a general agent for the purpose of making loans, for whose actions in taking more than a legal rate of interest the loan will be declared usurious.<sup>14</sup>

CHAS. A. ROBBINS.

LINCOLN, NEB.

<sup>8</sup> *Rogers v. Buckingham*, 33 Conn., 81; *Payne v. Newcomb*, 100 Ill. 611; *Smith v. Wolf*, 55 Iowa, 555; *Gokey v. Knapp*, 44 Id. 32; *Brigham v. Myers*, 51 Id. 397; *Acheson v. Chase*, 28 Minn. 211; *Strait v. Frary*, 33 Id. 194; *Jordan v. Humphrey*, 31 Id. 495; *Muir v. Newark Savings Inst.*, 16 N. J. Eq., 537; *Conover v. Van Mater*, 18 Id. 481; *Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 Id. 165; *Estevez v. Purdy*, 66 Id. 447; *Guardian Mut. Life Ins. Co. v. Kashaw*, Id. 544; *Van Wyck v. Watters*, 81 Id. 352; *Algar v. Gardner*, 54 Id. 360; *Barretto v. Snowden*, 5 Wend., 181; *North v. Sergeant*, 33 Barb. 350; *Fellows v. Commisloners*, 36 Id. 655; *Elmer v. Oakley*, 3; *Lansing* 34; *Coster v. Dilworth*, 8 Cow., 299; *Hopkins v. Baker*, 2 P. & H., (Va.) 110; *Dagnell v. Wigley* 11, East. 45; *Solarie v. Melville*, 7 B. & C., 429; *Tyler on Usury*, 156 et seq.

<sup>9</sup> 13 Neb. 157.

<sup>10</sup> 8 Neb. 423.

<sup>11</sup> *Austin v. Harrington*, 28 Vt., 130; *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 Id. 261; *Cheney v. Woodruff*, 6 Id. 151; *Courtney v. Price*, 12 Id. 188; *Olmstead v. New England Mtge. Security Co.*, 11 Id. 487. And see *Payne v. Newcomb*, 100, Ill. 611.

<sup>12</sup> *Payne v. Newcomb*, 100, Ill. 611.

<sup>13</sup> *Olmstead v. New England Mtge. Security Co.*, 11 Neb. 487.

<sup>14</sup> *Baxter v. Buck*, 10 Vt. 548; *Austin v. Harrington*, 28 Id. 130. And see *Rogers v. Buckingham*, 33, Conn. 81.

<sup>1</sup> *Beadle v. Munson*, 30 Conn. 175; *Hutchinson v. Hosmer*, 2 Id. 341; *Eddy v. Badger*, 8 Bissell, 238; *Wyllis v. Ault*, 46 Ia. 46; *Dickey v. Brown*, 56 Id. 426; *Ballinger v. Bowland*, 87 Ill. 513; *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. Woodruff*, 6 Id. 151; *Gray v. Blareom*, 29 N. J. Eq. 454; *Nichols v. Osborn*, 3 Atl. Rep. 155; *Fisher v. Porter*, 23 Fed. Rep. 162.

<sup>2</sup> *Wyllis v. Ault*, 46 Ia. 46.

<sup>3</sup> *Dickey v. Brown*, 56 Ia. 426; *Jordan v. Humphrey*, 31 Minn. 495.

<sup>4</sup> *Eslava v. Crampton*, 61 Ala. 507.

<sup>5</sup> *Smith v. Wolf*, 55 Ia. 555; *Acheson v. Chase*, 28 Minn. 211; *Thurston v. Cornell*, 33 N. Y. 281; *Eaton v. Alger*, 2 Keyes, 41; *Kent v. Phelps*, 2 Day, 483.

<sup>6</sup> *Payne v. Newcomb*, 100 Ill. 611; *Gokey v. Knapp*, 44 Ia. 32; *Demarest v. VanDenburg*, Atl. Rep. 69 Bonus v. Trefz, 2 Id. 369.

<sup>7</sup> 2 *McCrary C. C.* 522; s. C., 7 Fed. Rep. 737.

## WEEKLY DIGEST OF RECENT CASES.

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## 1. AGENCY — Principal and Agent — Liability of Principal for Act of Agent—Private Instructions.

—A principal is bound for the acts of his agent, done within the scope of his authority, and the principal will also be responsible for the unauthorized acts of the agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within, and not in excess of, the authority conferred on him. Where an agent is held out to the world as one having the authority of a general agent, any private instructions or limitations not communicated to the persons dealing with such agent will not affect them, nor relieve the principal from liability, where the agent oversteps such limitations. *Bank v. Everest*, S. C. Kans. Nov. 5, 1886; 12 Pac. Reps. 141.

## 2. BANKS AND BANKING — National Banks — Increase of Stock—Change of Increase—Rights and Liabilities of Shareholders — Subscription—Payment under Section 5205, Rev. St. U. S., not Discharge of Liability under Section 5151.

—Where a national bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it can reduce the amount of the increase to the amount actually paid; the amount of increase within the maximum being always subject to the discretion of the bank. Where a shareholder of a national bank subscribes to a certain increase of stock, and pays his subscription, and the bank afterwards reduces the amount of the increase, he waives all right to deny that his agreement binds him as a subscription to the reduced amount, when he pays on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the comptroller of the currency provided for in section 5205, Rev. St. U. S. The payment of an assessment imposed by a bank on its shareholders under section 5205, Rev. St. U. S., in order to continue business and avoid liquidation, is not a discharge of a shareholder's liability under section 5151, Rev. St. U. S., for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares. *Delano v. Butler*, S. C. U. S., Nov. 1, 1886; 7 S. C. Rep. 39.

## 3. CARRIERS — Limitation of Liability by Contract — Free Pass—New Trial—Special Verdict Setting Aside Findings — Negligence — Degrees — Special Findings — Causing Death — Evidence — Support — Damages — Appeal — Harmle

## Error — Introduction of Evidence — Verdict — Special Verdict—Instructions of Jury—Misstatement of Law Corrected—Excessive Damages.

—Where the acceptor of a gratuitous pass from a railroad company "assumes all risks of accident, and especially agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to his person," the contract relieves the company from liability for damage to him by reason of a want of ordinary care of its servants, unless the same is expressly made a crime. Where a special finding in a special verdict is set aside, a new trial should be ordered, unless it clearly appears that the finding is wholly immaterial, and can have no effect upon the judgment. Where a rescuing engine approached a stalled train in a snow storm without stopping or slackening speed, the fact that the jury made an erroneous special finding that the engineer of the rescuing engine could have seen the train in time to have stopped before running into it is no ground for setting aside a special finding that the negligence of the engineer was gross. In an action for damages for negligence causing the death of plaintiff's husband, it is material for her to show that she had no means of support except what he furnished her, as tending to prove that his death had caused her a pecuniary loss. The admission of incompetent evidence, which a special finding of the jury shows to have had no weight with them, is not a prejudicial error. The special verdict in this case is held definite and certain, and sufficient to sustain the judgment. In the charge to the jury a misstatement of the law, made apparently by mistake, and not in ignorance of the law, and followed by a correct statement of the law on the subject, is not a prejudicial error as having misled the jury. In an action for damages for death of plaintiff's husband, where deceased was 55 years old, in fair health, and capable of earning \$2.25 per day of 10 hours, and his family were, to a large extent, dependent on his labor for their support, a judgment of \$2,500 will not be disturbed as excessive. *Annes v. Milwaukee, etc. Co.*, S. C. Wis. Nov. 3, 1886; 30 N. W. Rep. 282.

4. COMMERCIAL LAW—Promissory Note—Indorsement—Accommodation—Usury — Affidavit of Defense—Sufficiency of.—A having received a promissory note in the regular course of trade, indorsed it in blank, and handed it to B, without receiving any consideration therefor. B did not indorse it, but handed it to C, who indorsed it to D, the latter bringing suit thereon against A. A filed an affidavit of defense, alleging that the note, though in the possession of D, belonged to C, who knew that A had received no consideration, but that it had been indorsed for the accommodation B, and B was entitled to a credit on said note for C's failure to deliver a certain order, and for another amount, exacted by C as usurious interest. Held, that this was a substantial defense to a part of the note, and that the court erred in entering judgment for want of a sufficient affidavit of defense. *Gunnis v. Weigley*, S. C. Penn. Oct. 4, 1886; 6 Atl. Rep. 465.

5. CONFLICT OF LAW.—Promissory Note Governed by Laws of State Where Made—Defenses—Statute of State may Change Operation of Law—Merchant.—Where promissory notes are made in Kentucky, and mailed to the payees, doing business in Boston, and made payable at the Kentucky Nat-

ional Bank, they are contracts of that state, and are to be governed by its laws. The statute of a State which gives the maker of a note the right to set up in defense any discount or offset that the defendant has and might have used against the original payee, or any intermediate assignee, before notice of the assignment, is constitutional and valid, although it changes absolutely the operations of the law-merchant, so far as it affects contracts made and to be performed within the State. *Shoe, etc. Bk. v. Wood*, S. J. C. Mass., Oct. 23, 1886; 8 N. E. Rep. 753.

6. CONSTITUTIONAL LAW—*Title of Statute—Subject Embraced.*—The Michigan act of 1883 (page 191), entitled "An act to provide for the incorporation of merchants' mutual insurance companies, and to regulate the business of insurance by merchants' and manufacturers' mutual insurance companies," is obnoxious to the constitutional provision that "no law shall embrace more than one object, which shall be expressed in its title." The first object, the incorporation of merchants' mutual insurance companies, and the second, the regulation of the business of insurance by merchants' and manufacturers' mutual insurance companies, have no necessary connection with each other. Such a statute cannot be supported by maintaining it as to one of its objects, and rejecting it as to the other. *Skinner v. Wilhelm*, S. C. Mich. Nov. 11, 1886; 30 N. W. Rep. 311.

7. CORPORATION — *Corporate Stock — Transfers — Lien of Corporation—Additional Security—Corporate Liabilities—For Acts of Agents.*—Where the charter of a corporation provides that no stockholder indebted to the corporation shall be permitted to make any transfer of his stock, or receive any dividend, until such debt is paid, or secured to the satisfaction of the president and board of directors, the corporation has a legal lien upon the stock held by its stockholders to secure the payment of any debt that such stockholders may owe it. Where a corporation which, by its charter, has a lien upon the stock of its stockholders for the payment of their indebtedness to it, takes from such debtors other security, it does not thereby, without affirmative evidence to the contrary, waive its lien upon the stock. An employee of a corporation who has no power to transact the general business of the corporation with third persons, and who is well known to have no such power, cannot, by any act of his, waive for the corporation the lien which its charter gives it on the stock of its stockholders for the payment of their indebtedness to it. *Kenton, etc. Co., v. Bowman*, Ky. Ct. App. Nov. 11, 1886; 1 S. W. Rep. 717.

8. CRIMINAL LAW—*Homicide—Justification—Self-Defense—Killing Through Fear of Life—Insanity — Who Capable of Committing.*—Where the accused leaves the stable where the quarrel arose, and, having obtained a shot-gun at the family residence, returns, and shoots the deceased, the court will not reverse a verdict of manslaughter, the right of self-defense not authorizing one to hunt up his adversary, and slay him under the idea that it is necessary to save his own life. Where the defense of insanity is interposed, the burden of proof is on the defendant; and, where the accused did the killing in a state of mind bordering on imbecility, an instruction to the jury that if defendant's mind was so feeble as not to enable him to distinguish right from wrong, or

had not sufficient power of control to govern his action by reason of mental weakness, they should acquit, is not error. *Farris v. Commonwealth, Ky.*, Ct. App., Nov. 14, 1886; 1 S. W. Rep. 729.

9. ——— *Murder — Evidence — Examination of Witness — Confession — Character of Deceased.*—On trial for murder, the court, in its discretion, may permit the district attorney to call the attention of witnesses to particular facts after they have gone through the story of the crime without interruption. In a trial for murder, testimony of a witness as to the confession of a prisoner after arrest is admissible, where such confession is not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution. On a trial for murder the court may properly exclude defendant's offer of evidence to show in support of a plea of justifiable homicide, that the deceased had treated his domestic animals with cruelty. The testimony must be to general reputation, and evidence of specific acts is inadmissible. Testimony to general reputation, in support of a plea of justifiable homicide, to show that deceased robbed his father of his grave clothes, when in his coffin, and wore them at his funeral, is wholly irrelevant. *People v. Druse*, N. Y. Ct. App., Oct. 26, 1886; 8 N. E. Rep. 735.

10. ——— *Threats, Effect of, to be Considered by Jury—Admissibility of Dying Declarations—Res Gestæ.*—One against whom threats are made is not justifiable in assaulting the one who makes such threats, unless the latter makes some attempt to execute his threats. A mere intent to commit a crime is not a crime—an attempt to perpetrate it is necessary to constitute guilt in law. In an indictment where the plea of self-defense is interposed for murder, the jury are to consider threats made by the deceased, and his character as a turbulent and dangerous man, in determining the question as to who was the assailant, and whether the defendant had reasonable grounds to apprehend and did apprehend that he was in imminent danger of sustaining great bodily harm, and an instinct which ignores the considerations is improperly given. Declarations made by the deceased to his wife, very soon after he had been shot by the defendant, after he had gone about two hundred yards from the place where he had been shot, and after his wife had gone more than one hundred yards to join him, to either, "Oh, hun, he has shot me," or "Oh hun, he has killed me," (the wife not being clear as to which expression was used,) are not admissible as part of the *res gestæ* (1 Green, Ev. § 108), nor as dying declarations. If the deceased had said "Oh, hun, he has killed me," which, taken in connection with the nature of his wound, and the short time after the shot before he died, would tend to show that he was impressed with the fact that the wound would be fatal, thus bringing it within the rule that it was made "under a sense of impending death," and hence rendering it admissible within the meaning of the rule of dying declarations. *State v. Rider*, S. C. Mo., Nov. 15, 1886.

11. ——— *Receiving Stolen Property—Presumption From Possession—Defendant Witness in His Own Behalf—Impeachment of—Cross-Examination—Testimony as to Character—Single Acts of Moral Delinquency Inadmissible—Possession of Stolen Property—Defendant Charged with Receiving—No Presumption of Guilt.*—When a defendant be-

comes a witness in his own behalf he is subject to the same rules and may be impeached as any other witness, except that upon his cross-examination he can only be inquired of concerning matters he has testified to in his examination-in-chief. Witness as to character should not be permitted to give evidence as to single acts of moral delinquency. The possession by a defendant of stolen property recently after the theft raises a presumption that he stole it, but such possession by a person who is charged with receiving stolen property, "knowing it to be stolen," does not raise a presumption that he had knowledge that it was stolen. *State v. Bulla*, S. C. Mo., Nov. 15, 1886.

**12. DAMAGES—Penalty or Liquidated Damages—Breach of Contract—Fixed Sum, When a Penalty.**

—Where H sells his business and good-will to G, and, as a part of the same transaction, executes a written instrument, in which he says: "I \* \* \* bind myself in the sum of \$500" that I will not engage in such business, at the same place, for the period of five years: held, that the sum named in the instrument is a penalty, and not liquidated damages; and, for a breach of the agreement by H, G may recover only his actual damages. Whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that might occur, or the amount of damages that might ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages. *Heatwole v. Gorrell*, S. C. Kans., Nov. 5, 1886; 12 Pac. Rep. 129.

**13. DRAINS—Notice—Estoppel—Signing Petition.**

—Where land-owners are parties to a petition to establish a ditch of which some notice, although insufficient, is given, and they have actual knowledge of such petition, and the proceedings thereunder, they will, in case they permit without objection, money to be expended on the faith that such proceedings were valid, be precluded from afterwards questioning the sufficiency of the notice. *Peters v. Griffie*, S. C. Ind. Oct., 30, 1886; 8 N. E. Rep. 727.

**14. EJECTMENT—Pleading—General Denial—Evidence—Equitable Defense—Defense of Equitable Title in Stranger.**

—Under a statutory general denial in an action for recovery of real estate, any facts which show that according to the principles of equity, as applied by courts of chancery, the plaintiff ought not to recover possession of the land in controversy, may be given in evidence to defeat a recovery. In an action to recover possession of real estate, the defendant in possession cannot defend on the ground that a stranger, with whom he is not in privity, is the equitable owner thereof, and entitled thereto by reason of a mistake in a deed by which it was intended to convey the real estate in controversy to such stranger, but under which the defendant makes no claim. *East v. Pedin*, S. C. Ind., Oct. 27, 1886; 8 N. E. Rep. 722.

**15. EQUITABLE ACTION TO REDEEM—Absence of Tender Unimportant—Laches, When it Has Rights—Limitation, Analogous Rule to Law Not Followed, When—Purchaser of Equity of Redemption, When—Permitted to Redeem.**—In an equitable proceeding having for its object the setting

aside of a sale made under a deed of trust and for permission to redeem the property, for an accounting of rents and profits, and that the title be decreed to vest in plaintiffs on payment by them of the balance found to be due defendant, and for general relief, the fact that no tender of money due was made in the petition is not important. Where the suit is not brought for nearly three years after the sale, and where it appears that in the meantime defendant had repaired the premises, paid taxes and effected insurance, and the plaintiff being fully cognizant of all that had occurred, such laches will bar plaintiffs' suit. 63 Mo. 56; 2 Wall. 94; 94 U. S. 807; 91 U. S. 591; 67 Mo. 181. Courts of equity when enforcing legal or analogous rights, as in administering remedial justice, will generally adopt that limit of time prescribed by the statute of limitations (Adams Eq., 227), but when the relief sought is based upon a right purely equitable, where it is cognizable alone in a court of conscience, that court acts solely upon its own inherent rules, altogether outside of and independent of the statute of limitations. Where a plaintiff is a mere purchaser of the equity of redemption he can not prevail in the suit without paying off the debt, principal and interest, taxes, repairs, etc. *Kline v. Vogel*, S. C. Mo. Nov. 15, 1886.

**16. EQUITY—Sale by Order of Court—Confirmation**

—*Lands Held in Fee-Simple.*—In an equitable proceeding, under the Kentucky Civil Code, § 491, by the owner of a life-estate against the owners of the remainder, for the sale of the lands, where it appears that two tracts of land are directed to be sold, and that one of these tracts is held by the petitioner in fee-simple, and the court had no power to direct a sale of it, the order confirming the sale cannot stand; but, before setting it aside, the court will give the petitioner a reasonable time within which to tender a deed of conveyance sufficient to pass the title of the tract held in fee-simple, and if such deed be tendered, will confirm the sale, but if not tendered, will set it aside *in toto*. *Munnell v. Orear*, Ky. Ct. Appls., Nov. 13, 1886; 1 S. W. Rep. 725.

**17. EVIDENCE—Dying Declarations—Homicide—Appeal—Absence of Notice—Conduct of Trial—Relative of Deceased Advising the Prosecuting Attorney—Criminal Law—Prosecution Calling Witness After Closing—New Trial—Newly-Discovered Evidence—Cumulative—Ignorance of, Not Explained.**

—Repeated declarations of deceased that the accused was his murderer, made in full knowledge that he would have to die in a few hours, are admissible. Where the question is whether it was the accused who committed the offense, and the evidence points with almost unerring certainty to him as the guilty party, a verdict of guilty will not be disturbed because no motive appeared or is suggested for the act. Permitting a witness who is a kinsman of the deceased, to be present at the trial, and advise with the prosecuting attorney, is not error. Where the prosecution, after it has closed, is permitted to call another witness, whose testimony proves to be stronger for the accused than against him, and there is no error of which he can complain. When newly-discovered evidence, on which a motion for a new trial is based, is only cumulative testimony, and that of intimate friends of the accused, and no reason is assigned why their testimony was not made known to him and his attorney during the trial, the motion will

be denied. *Marcum v. Commonwealth*, Ky. Ct. Appls., Nov. 13, 1886; 1 S. W. Rep. 727.

18. EXECUTORS AND ADMINISTRATORS—*Action Against, in Regard to Settlement of Estates—Heirs and Distributes—Surcharge and Falsification—Limitation of Action Against—Exceptions.*—The heirs and distributes of the estate of a father or a mother cannot maintain a suit to surcharge the accounts of the administrator of their grandfather's estate. The grandfather's distributees, or, after their death, their personal representatives, are the proper parties plaintiff for that purpose. Where an administrator has made a final settlement of his accounts, and twelve years afterwards a suit for surcharge and falsification is brought by plaintiffs without showing themselves, by allegation or proof, to be within the exception of the statute of limitations, the statute will be a bar to the suit, and no relief will be granted. *Hordage v. Hordage*, S. C. Ark., Oct. 23, 1886; 1 S. W. Rep. 707.

19. — *Bill to Set Aside Fraudulent Conveyance—Parties—Purchaser—Knowledge of or Participation in Fraud.*—Where a bill is filed by an administrator, under the Michigan statute, against several grantees holding by conveyance from one to the other, to set aside a deed made by his decedent as fraudulent as to creditors, and to subject the property to the payment of his debts, if the first grantee who disposes of the same by a warranty deed is not also made a party, the bill will be dismissed. To render a conveyance void for fraud upon creditors, it is necessary that the grantee should have a knowledge of, and in some way participate in, the fraud. *Fraser v. Passage*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 324.

20. — *Insolvent Estates—Recognizance in Partition Not Satisfactory by Fact of Insolvency.*—The fact that a decedent's estate is insolvent does not, by operation of law, satisfy a recognizance given by one of the heirs to the others upon partition proceedings in the course of administration. *Appeal of Gabler*, S. C. Penn., Oct. 18, 1886; 6 Atl. Rep. 449.

21. FRAUDULENT CONVEYANCES—*Presumption of Fraud—Creditor's Bill.*—Where a creditor takes a chattel mortgage on the goods of a trader to secure a debt subject to a prior mortgage, but omits to file his mortgage for five months, and subsequently purchases the prior chattel mortgage, and a further debt for which the owners had attached the goods, and holds possession by virtue of such purchase till the debtor has given him a mortgage covering all the debts, and the debtor then transfers his business and goods to his wife, who assumes his debts, such transactions do not raise such an irresistible presumption of fraud as will entitle a judgment creditor (who had sold the debtor goods during the interval between the execution and filing of the first-mentioned mortgage) to subject the property to his judgment; the fraud being denied, and such judgment creditor having obtained no lien upon the property. *Krolik v. Root*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 339.

22. FRAUD—*Statute of Frauds—Pleading—Suit for Specific Performance—Part Performance—Exchange of Lands—Witness—Transactions With Deceased Persons—"Interested Witness" Defined.* In a suit for specific performance of a contract to

convey lands, defendant cannot avail himself of the statute of frauds as a defense, unless the want of compliance with the statute appears upon the face of the pleadings. Where, in pursuance of an agreement for the exchange of lands, one party has conveyed, this is such part performance as will take the case out of the operation of the statute of frauds. In determining who is an interested witness, and therefore incompetent, under the statute, as to transactions with deceased persons, as against representatives, the test is whether the witness will either gain or lose by the direct legal operation and effect of the judgment, or whether the record will be legal evidence for or against him in some other action. *McClure v. Otrich*, S. C. Ill., Oct. 7, 1886; 8 N. E. Rep. 784.

23. INSOLVENCY—*Liability of Assignee—Omission from Dividend of Accounts Properly Filed, but Misplaced.*—The assignee of an insolvent estate is responsible for the exercise of good faith and reasonable diligence in the administration of his trust, and such is the measure of his liability. Accordingly, where an assignee used reasonable diligence in searching for and in endeavoring to ascertain what releases of their claims against an insolvent had been filed by creditors with the clerk in pursuance of the statute, and the releases of certain creditors which had been actually filed, but had been, by mistake, misplaced among the files in another case, and of the filing of which no notice was given him, were not found, and did not come to the knowledge of the assignee till after the distribution by him in good faith, upon an order of the court, of the assets among the other creditors who had filed releases, held, that such assignee was not personally liable for the amount of the dividends claimed by the creditors so omitted in such distribution.—*In re Robbins*, S. C. Minn., Nov. 9, 1886; 30 N. W. Rep. 304.

24. INSURANCE—*Fire Insurance—Action—Evidence—Opinion—Value of Horses.*—Where the question, whether the defendant had an insurance on certain property or not, arises incidentally in the case, and the plaintiff proves that he had, and the defendant afterwards, by his own testimony, shows that he had, it is immaterial whether the evidence showing in the first instance that he had such an insurance is competent or not. Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses, and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto. *Reed v. New*, S. C. Kan., Nov. 5, 1886; 12 Pac. Rep. 139.

25. — *Authority of Agent—Alteration of Policy—Application for Alteration in Policy.*—An agent or broker of a fire insurance company who has been authorized to deliver a policy issued by it, and to receive the premium therefor, has no power or authority, unless expressly conferred, to bind the company, by subsequently altering the contract of insurance, by the insertion of a clause binding the company to pay the loss to one other than the assured, though such policy was written upon the application of the agent for the assured. An agent receiving from the assured an application for a change in a policy of insur-

ance, and undertaking to procure such change, is to be treated as the agent of the assured, and not of the company.—*Duluth, etc. Bank v. Knoxville, etc. Co.*, S. C. Tenn., Oct. 30, 1886; 1 S. W. Rep. 689.

**26. JUDGMENT—Court of General Jurisdiction—Presumption—Lapse of Time—Execution—Sale—Sheriff's Return—Amendment—Confirmation of Sale—Trusts—Resulting and Secret Trusts—Infants—Disaffirmance of Contract—Reasonable Time—Statute of Limitations—Retroactive Laws—Deeds—Execution in Foreign State—Evidence—Certification.**—Where a court of general jurisdiction has rendered judgment in a case, under which the real estate of one of the defendants has been levied upon and sold, and the sale confirmed, and a deed made to the purchaser, the court will not, upon slight evidence, after a great lapse of time, hold that it was without jurisdiction. The court, in furtherance of justice, may, after a sale of real estate upon execution and a return of the officer, permit the officer to amend the return to conform to the facts; and, where it is clear that the amendment should be made, the lapse of eight or nine years will not bar the right, but in such case care must be exercised by the court to prevent an abuse of power. In this State the confirmation of the sale covers all irregularities in the proceedings. Lands conveyed by a warranty deed are not subject to a secret trust in favor of the grantor; and particularly is this true where the lands are afterwards sold at judicial sale as the property of the grantee, and conveyed to an innocent purchaser. A minor who has conveyed his real estate must disaffirm his deed within a reasonable time after he comes of age, or be barred of the right. The act of 1869, which reduced the period of limitation in which an action to recover real estate could be brought from 21 years to 10 years, and gave a reasonable time in which to bring actions before it took effect, applies to causes of action existing before the passage of the statute. A deed of real estate executed in another State before an officer having no seal, to be admissible in evidence, must be certified in the manner provided in the statute.—*O'Brien v. Gaslin*, S. C. Neb., Nov. 4, 1886; 30 N. W. Rep. 274.

**27. NEGLIGENCE—Contributory Negligence—Employment on Railroad Track.**—Where the engineer of a railroad company on an overdue train desecrates a man on the defendant's track three-quarters of a mile ahead, going in the same direction, on a straight track, in broad daylight and blows his whistle and rings the bell, but, the man apparently taking no notice thereof, and continuing to walk on the track, the engineer knocks down and kills him, there is no excuse shown for running the engine over him, even if the man had turned and faced the train; and the deceased, being an employee, and rightfully on the track, will not be held guilty of contributory negligence that would prevent a recovery of damages by his administrator.—*Baumeister v. Grand Rapids, etc. Co.*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 337.

**28. NUISANCE—Overflowed Land—Trespass—Continuing Nuisance—Notice—Evidence—Pennsylvania Act May 2, 1876—Special Damage Claimed—Nominal Damages Recovered—Damages to Time of Trial.**—The object of the Pennsylvania Act of May 2, 1876 (P. L. 95), is to avoid multiplicity of suits, and in an action of case by the owner of land overflowed by the unlawful

erection and maintenance of a dam, the plaintiff, who has given the notice required by that act, may introduce evidence tending to show that after suit brought the defendants persisted in continuing and strengthening the dam, which constituted the alleged nuisance. In an action for overflowing the plaintiff's land by the erection of a dam on the defendant's land, where the nature and extent of the alleged injury are specially described in the declaration, the failure to prove the damages as alleged, does not prevent the recovery of nominal damages. Where the plaintiff in an action of trespass on the case for a continuing nuisance gives 15 days' notice, under the Pennsylvania act of May 2, 1876 (P. L. 95), he is entitled to recover such damages, not barred by the statute of limitations, as he has suffered up to the time of trial. This act is to avoid a multiplicity of suits, and the damages suffered between the bringing of the suit and the trial, do not constitute a new cause of action.—*Humphrey v. Irvin*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 479.

**29. POST-OFFICE—Railroad Companies—Land Grant—Postal Service Contracts—Contract Implied From Service—Government Mail Contracts—Postal Regulations.**—Where, in the condition for the carrying of the United States mails, attendant upon the land grant to a railroad corporation, the postmaster-general is empowered to establish the price until fixed by congress, such power includes the power to prescribe the period of its duration which is in his discretion, unless collateral stipulations, which could not be enforced without consent of the company, are annexed to the agreement with him. In that case a contract is created which cannot be disregarded by the government without a breach of good faith. The plaintiff, a railroad company, carried the United States mails for four years under a written contract with the postmaster-general. It was bound to carry the mails, under the terms of its land grant, at such prices as congress should, by law, direct. After the expiration of the written contract the company continued to perform the same services for four years more, receiving pay for some months at the old rate, then at a reduced rate fixed by the postmaster-general, and then at rates reduced twice successively by acts of congress, of which the plaintiff received notice. Held, on action to recover the difference between the rates as reduced by congress, and the rate fixed by the postmaster-general, no right could be implied against the government from the continuance of the services, nor was plaintiff bound by the terms of its written contract. A regulation of the post-office department that contracts in a section of the country are to be let for four years, cannot be held to impose any obligation on the postmaster-general so that a contract, to be implied from services rendered after the expiration of a written contract, should be construed to last four years, but is merely designed to further the administration of business.—*Jacksonville, etc. Co. v. United States*, S. C. U. S., Nov. 1, 1886; 7 S. C. Rep. 48.

**30. Railroad Company—Master and Servant—Action to Recover for Personal Injuries Sustained by Servant—Pleadings—Allegations of Negligence in Petition—Evidence Supports Action—Contributory Negligence—Danger of Risk to Servant by Continuing the Employment—When Question for Jury.**—In an action against a railroad company by its former servant to recover damages for personal

injuries, the petition charges a failure of duty on the part of defendant to furnish a sufficient number of servants in conjunction with plaintiff to carry on the business, that defendant was duly notified of the insufficient help, and by reason thereof plaintiff was injured without contributory negligence on his part, it states a cause of action. The rule stated in Thompson on Neg. p. 1050, held to be supported by cases not in accord with the Missouri rule. *Petty v. H. & St. J. R. R.* Evidence examined and held to support substantially the allegations in the petition that plaintiff's hand was injured by the collision of the cars, that the help was insufficient, that the testimony establishes a legal connection between the injury to the plaintiff and defendant's negligence. Where a plaintiff remains at work with insufficient help to properly discharge the duties imposed upon him and his co-laborers, as where engaged in switching cars with only three men, when four should have been provided, he is not thereby, chargeable with negligence, if the danger or risk is not such that as a prudent man he was bound not to assume it, and refuse to continue in the service: *Shearm. & Red. Neg.* (3d ed.) p. 125; *Wood's Ry. Law* p. 1460; *Wood's Master and Servant*, p. 761; *Snow v. Housatonic R. R.*, 8 Allen, 450; *Patterson v. R. R.*, 76 Pa. St. 113; *Tiler v. R. R.*, 49 N. Y. 50; *Clarke, v. Holmes*, 7 H. & N. 942. If the defect and insufficiency in the appliances is so great that obviously with the use of great caution the danger was imminent, then, as a matter of law, the servant who incurs the risk is guilty of contributory negligence and cannot recover; but if upon this question there is substantial doubt it is one of fact for the jury, and a nonsuit or demurrer to the evidence is not permissible. *Wood's Ry. Law* p. 1460; *Wood's Master and Servant*, p. 761; *Conroy v. Vulcan Iron Works*, 62 Mo. 39. *Thorpe v. Mo. Pac. R. R. Co.*, S. C. Mo. Nov. 15, 1886.

31. **SALE—Purchaser's Rights and Remedies—Damages—Recoupment.**—When an article is sold, accompanied with a warranty, direct or implied, and it proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of the defects, bring his action for the recovery of damages; or, if sued for the price, may set up and have such damages allowed him by way of recoupment from the sum stipulated to be paid. *Buffalo, etc. Co. v. Phillips*, S. C. Wis., Nov. 3, 1886; 30 N. W. Rep. 295.

32. **SHERIFF—Action Against for Failure to Serve Writ of Attachment—Defense that Assignment had been Made—Bond of Assignee.**—In an action against a sheriff for damages on account of his failure and neglect to serve a writ of attachment, when the defense is set up that the property upon which he was directed to levy had been transferred to an assignee by assignment for the benefit of creditors, it is incumbent upon the defendant to show that a bond had been filed by the assignee within the time required by statute, or that creditors had intervened to enforce the assignment. *Beard v. Clippert*, S. C. Mich., Nov. 17, 1886; 30 N. W. Rep. 323.

33. — **Partition Sale—Failure to Pay Over Proceeds—Record—Prima Facie Evidence.**—Where the record showed in a partition suit that the property was ordered to be sold by the sheriff, and the proceeds divided among the parties, according to their interests, and the sheriff's

report showed he did sell the land, and received the cash payment, and it appears that his report was duly approved by the court, held, in an action on the bond of the sheriff against him and his sureties therein, brought by the plaintiff, who the record showed had a certain interest in the property, that he thereby established a *prima facie* case against the sheriff and his sureties, and is entitled to recover from them his portion of the cash payment, though no further order of distribution has been made by the court after the sale. *State ex rel. v. Frazier*, S. C. Mo., Nov. 15, 1886; 1 S. W. Rep. 739.

34. — **Writ of Execution—Informality—Failure to Sell and Make Return—Liability—Failure to Return Process—Instructions from Plaintiff's Attorney.**—When a sheriff has accepted a writ of execution, and levied upon it, but has failed to make a sale and return within the time specified by law, it is no defense to an action against him for such failure that the clerk of the court had affixed a name other than his own to the writ, the error being matter of form, and amendable. If a sheriff is misled by the advice of plaintiff's attorney, so that he postpones the date of sale beyond the lifetime of a writ of execution, this, although it may furnish a satisfactory reason for not selling, and for not having the money to tender to the plaintiff, is no defense to an action by plaintiff for his failure to return the process within the time limited by law. *Jett v. Shinn*, S. C. Ark., Oct. 16, 1886; 1 S. W. Rep. 693.

35. **STATUTES—Repeal—New Provisions—Implication—Substitute—Criminal Law—Indictment—Statutory Offense—Words of Equivalent Import—Construction.**—Where an act contains no repealing clause, and makes no reference to an earlier one, but covers the whole subject and embraces new provisions, it will be held to be intended as a substitute for the first, and to operate as an implied repeal. An indictment upon a statute must state all the circumstances which constitute the statutory offense; no case being brought by construction within a statute unless it is completely within its words, or words of equivalent import. *Wood v. State*, S. C. Ark., Oct. 30, 1886; 1 S. W. Rep. 709.

36. **TRUSTS—Constructive Trust—Purchase at Mortgage Foreclosure.**—The only question in this case being one of fact, as to whether the defendant, a creditor of an estate under administration, purchased certain property of the estate sold under a mortgage, as trustee, and for the exclusive benefit of the widow and heirs of decedent, or for his own benefit, to satisfy his claim against the estate, and defendant having testified denying any such understanding, or personal acquaintance with defendants, and it appearing from the report of the commissioners that the profit he had made out of the land did not amount to his claim against the estate, and a balance was still owing to him, and on the evidence generally, held, that defendant was in no way proved to have acted as trustee for the widow and heirs. *Ball v. Gaff*, Ky. Ct. App., Nov. 13, 1886; 1 S. W. Rep. 724.

37. **VENDOR AND VENDEE—Lien—Payment in Personal Services—Bill to Enforce—Answer—Reply—Set-Off and Counter-Claim—Decree—Pleading—Practice.**—Where land is sold for a specific price in money, which it is agreed may be paid in personal services, the lien may be enforced if the services are not rendered. Where a bill was filed

for the foreclosure of a vendor's lien, and the answer contained a set-off and counter-claim, to which no reply was filed, the defendant may move for judgment upon the undenied plea; and if he fails to do so, and goes to trial as if the issue was made up, he cannot afterwards object that the decree against him was wrong, on the ground that the failure of the plaintiff to reply was a practical confession of the set-off and counter-claim which he had pleaded and claimed in the answer. Where P executed a note to F for a certain sum of money payable on a specified day, but to be discharged in fees as attorney, provided F's business amounted to so much, otherwise to be paid in currency, *held*, on bill in equity to collect the note, that as F had paid P for services already rendered, and had not withdrawn his business until after the maturity of the note, P could not plead, as a set-off, claims in his hands for collection, on which his fees would have amounted to so much if F had not withdrawn them. *Winters v. Fain*, S. C. Ark., Oct. 39, 1886; 1 S. W. Rep. 711.

38. **WAYS—Public Highway—Uses—Vacant Land—Prescription—Possession by Public Authorities.**—Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years, is not sufficient to constitute it a public highway. Where a road has been traveled for more than fifteen years, but has not been established under the statutes of the State, and has not been expressly dedicated nor impliedly dedicated, unless by prescription or limitation, and the land over which it runs was for several of the first years vacant and unoccupied, *held*, that such road is not a public highway by prescription or limitation, unless the public by its constituted authorities, took the possession of the road, and used it and maintained it as a public highway for at least fifteen years. *State v. Horn*, S. C. Kans., Nov. 6, 1886; 12 Pac. Rep. 148.

#### QUERIES AND ANSWERS.\*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

#### QUERIES.

Query No. 34. Sec. 458, Rev. Stat. Mo. (attachment act) says, in all cases where property, etc., shall be attached the defendant may file a plea in the nature of a plea in abatement, verified by affidavit, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out. Section 3521 (practice in civil cases) provides the answer for the defendant shall contain, first: A general or special denial of each material allegation of the petition controverted by defendant, or any knowledge or information thereof sufficient to form a belief, etc. On this state of the law, ought a plea in abatement, which "denies each and every allegation contained in the affidavit for the attachment," verified by affidavit, be held sufficient on a motion in arrest? . S.

#### RECENT PUBLICATIONS.

**A TREATISE ON THE LAW OF COMMERCIAL PAPER**, containing a full statement of existing American and Foreign Statutes, together with the Text of the Commercial Codes of Great Britain, France, Germany and Spain. By Joseph F. Randolph, of the New Jersey Bar. In Three Volumes, with Appendix. Jersey City, N. J. Frederick D. Linn & Co. Law Publishers and Booksellers, 1886.

We have received the first and second volumes of this work (the third will, we learn, be issued within a month or two), and have examined them with much care and interest. In the first place, we may say that the arrangement and orderly division and subdivision of the subject leave nothing to be desired; the typography is excellent; each volume is complete in itself, with tables of cases and index, the latter of which is unusually large and exhaustive. In short, the book, as law book, is perfect.

As to matters of substance, this book bears unmistakable evidence of great labor and research, faithfully performed. As its title page indicates, it includes not only the law, controlling the subject, of the United States, but also the "commercial codes of Great Britain, France, Germany and Spain," and is, therefore, practically cosmopolitan, a compendium of the law relating the commercial paper of nearly the whole civilized world. The effort is certainly ambitious, but it is only fair to say that the performance is commensurate with the dignity of the undertaking. Of the magnitude of the subject some idea may be obtained by reflecting that, from the necessity of the case, the writer must treat of commercial paper, as affected by the relations and disabilities of parties, as alien, enemies, lunatics, drunkards, infants, *femes covert*, corporations, principals and agents, partners, executors, etc., to say nothing of the infinite variety of the irregular modes of transferring the title from one holder to another, and the effect and operation of insolvency and bankrupt laws.

All these subjects the author has treated with great care and in a singularly lucid style. Returning to matters of arrangement, we are impressed by several improvements upon the usual style of getting up law books. The index refers to the number of the sections, and that fact appears in the head-line of each page of the index; the citations of State codes, revised statutes, etc., bear the date of the publication of the volume, and in all citations of American cases appears the year of the Lord in which the decision was rendered. These may seem at first blush, to be small matters, but a little reflection will demonstrate that they are worthy of consideration, especially when applied to a subject, of which time is so much of the essence. In no branch of the law is the "modern instance" more potent than in that relating to commercial paper.

Take it altogether, we think the work before us is a very valuable addition to the literature of commercial law, and well worthy of a favorable reception by the profession.

#### JETSAM AND FLOTSAM.

**SCENE IN CIRCUIT COURT.**—Counsel—"What was the number of the locomotive engine?" Witness—"616." "How do you know?" "I saw it." "How?" "What are my eyes for?" "Where was the number?" "On the engine." "On what side of the engine?" "On the outside." And being fully answered, we presume the counsel had no more to say.

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